No. 15-7250

Title:	Marcelo Manrique, Petitioner
	v.
	United States
Docketed:	December 4, 2015
Lower Ct:	United States Court of Appeals for the Eleventh Circuit
Case Nos.:	(14-13029)
Decision Date:	July 15, 2015
Rehearing Denied:	September 11, 2015

Questions Presented

--Date--	-------Proceedings and Orders----------
Dec 2 2015	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due January 4, 2016)
Dec 30 2015	Order extending time to file response to petition to and including February 3, 2016.
Jan 19 2016	Order further extending time to file response to petition to and including March 4, 2016.
Mar 4 2016	Brief of respondent United States in opposition filed.
Mar 24 2016	DISTRIBUTED for Conference of April 15, 2016.
Apr 18 2016	DISTRIBUTED for Conference of April 22, 2016.
Apr 25 2016	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
May 20 2016	The time to file the joint appendix and petitioner's brief on the merits is extended to and including July 8, 2016.
May 20 2016	The time to file respondent's brief on the merits is extended to and including September 1, 2016.
Jul 8 2016	Joint appendix filed. (Statement of costs filed)
Jul 8 2016	Brief of petitioner Marcelo Manrique filed.
Jul 13 2016	SET FOR ARGUMENT on Tuesday, October 11, 2016.
Jul 22 2016	Record requested from U.S.C.A. 11th Circuit.
Aug 2 2016	Record received from U.S.D.C. Southern Dist. of Florida is electronic and located on PACER. Also received SEALED pleadings (1 Envelope).
Aug 19 2016	CIRCULATED.
Sep 1 2016	Brief of respondent United States filed. (Distributed)
Sep 30 2016	Reply of petitioner Marcelo Manrique filed. (Distributed)
Oct 11 2016	Argued. For petitioner: Paul M. Rashkind, Assistant Federal Defender, Miami, Fla. For respondent: Allon Kedem, Assistant to the Solicitor General, Department of Justice, Washington, D. C.

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RECORD
AND
BRIEFS

No. 15-7250

IN THE
SUPREME COURT OF THE UNITED STATES

MARCELO MANRIQUE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

SUPREME COURT, U.S.
FILED
DEC 02 2015
OFFICE OF THE CLERK

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, MARCELO MANRIQUE, pursuant to Sup. Ct. R. 39.1, respectfully moves for leave to file the accompanying petition for writ of certiorari in the Supreme Court of the United States without payment of costs and to proceed in forma pauperis.

Petitioner was previously found financially unable to obtain counsel and the Federal Public Defender of the Southern District of Florida was appointed to represent Petitioner pursuant to 18 U.S.C. § 3006A. Therefore, in reliance upon Rule 39.1 and § 3006A(d)(6), Petitioner has not attached the affidavit which would otherwise be required by 28 U.S.C. § 1746.

MICHAEL CARUSO
Federal Public Defender

Miami, Florida
December 2, 2015

By: _____

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IN THE
SUPREME COURT OF THE UNITED STATES

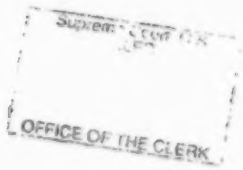
MARCELO MANRIQUE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.



On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Fed. R. App. P. 4(b)(2) allows that "[a] notice of appeal filed after the court announces a decision, sentence or order – but before entry of the judgment – is treated as filed on the date of and after entry." The rule incorporates this Court's decision in Lemke v. United States, 346 U.S. 325 (1953) (per curiam) and decisions of the circuits that a premature notice of appeal matures or springs forward when the judgment under review is entered. The interaction of this rule with deferred restitution judgments has become a source of circuit conflict, particularly following this Court's decision in Dolan v. United States, 560 U.S. 605 (2010), which allows a sentencing court to retain jurisdiction after sentencing to award restitution under the Mandatory Victim Restitution Act, 18 U.S.C. § 3664(d)(5). At the time Dolan was decided, the Court acknowledged that "the interaction of [deferred] restitution orders with appellate time limits could have consequences", but it "le[ft] all such matters for another day." 560 U.S. at 618. The Manrique decision, below, exemplifies those consequences and highlights the significant circuit split that exists concerning the jurisdictional prerequisites for appealing a deferred restitution award.

This case mirrors a typical deferred restitution appeal. At Manrique's sentencing hearing, the district judge pronounced terms of imprisonment and supervised release, and announced that "restitution is mandatory." The final judgment imposing sentence deferred entry of the precise restitution amount, stating it would be contained in an amended judgment. Manrique filed a notice of appeal. While the appeal of his sentence was pending, but before any briefing took place, a second final judgment was entered,

identical in all respects to the first, except it detailed the specifics of restitution. Both parties thereafter briefed the appeal, including a challenge to the restitution award. Although the government posited no objection, the Court of Appeals ruled, sua sponte, that it did not have jurisdiction over the restitution award because Manrique did not file a second notice of appeal designating the amended judgment setting forth the restitution amount.

The Eleventh Circuit's decision below in United States v. Manrique, 618 F. App'x 579 (11th Cir. 2015), conflicts with the Court's decision in Lemke, the ripening clause of Rule 4(b)(2), and the jurisdictional determinations of the First, Second, Sixth and Ninth Circuits. Confusing that circuit split, two of the four circuits that acknowledge their jurisdiction over deferred restitution judgments have failed to give effect to the ripening clause of Rule 4(b)(2). Uncertain about the interaction of appellate rules, the First Circuit recommends, prospectively, that a second notice of appeal should be filed as to restitution awards, while the Ninth Circuit will dismiss such an appeal if the government simply objects to the timeliness of the premature notice.

Question presented: Should the Court grant certiorari to resolve the significant division among the circuits concerning the jurisdictional prerequisites for appealing a deferred restitution award made during the pendency of a timely appeal of a criminal judgment imposing sentence, a question left open by the Court's decision in Dolan v. United States, 560 U.S. 605, 618 (2010)?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

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No:

IN THE
SUPREME COURT OF THE UNITED STATES

MARCELO MANRIQUE,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Marcelo Manrique respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 14-13029 in that court on July 15, 2015, United States v. Marcelo Manrique, 618 F. App'x 579 (11th Cir. 2015), reh'g en banc denied on September 11, 2015, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida.

OPINIONS BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida, is contained in the Appendix at A. A copy of the Order denying rehearing en banc is appended at B.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The decision of the Court of Appeals, denying a timely-filed petition for rehearing and rehearing en banc, was entered on September 11, 2015. This petition is timely filed pursuant to Sup. Ct. R. 13.1. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that Courts of Appeals shall have appellate jurisdiction of all final decisions of United States district courts.

STATUTORY AND RULES PROVISIONS INVOLVED

Rule 4, Federal Rules of Appellate Procedure
Appeal as of Right–When Taken

***

(b) Appeal in a Criminal Case.

(1) Time for Filing a Notice of Appeal.

(A) In a criminal case, a defendant's notice of appeal must be filed in the district court within 14 days after the later of:

(i) the entry of either the judgment or the order being appealed; or

(ii) the filing of the government's notice of appeal.

***

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision, sentence, or order – but before the entry of the judgment or order – is treated as filed on the date of and after the entry.

Rule 52, Federal Rules of Criminal Procedure
Harmless and Plain Error

(a) **Harmless Error.** Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

Title 18 U.S.C. § 2252(a)(4)(B)
§ 2252. Certain activities relating to material involving the sexual exploitation of minors

(a) Any person who –

***

(4) . . . (B) knowingly possesses, or knowingly accesses with intent to view, 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if –

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct;

shall be punished as provided in subsection (b) of this section.

***

(b)(1) Whoever violates, or attempts or conspires to violate, paragraph (1), (2), or (3) of subsection (a) shall be fined under this title and imprisoned not less than 5 years and not more than 20 years . . .

Title 18 U.S.C. § 3663A

§ 3663A. Mandatory restitution to victims of certain crimes

(a)(1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.

* * *

(c)(1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense--

***

(B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.

Title 18 U.S.C. § 3664

§ 3664. Procedure for issuance and enforcement of order of restitution

* * *

(d)(5) If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing. If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief.

STATEMENT OF THE CASE

A. District Court Proceedings.

Marcelo Manrique pleaded guilty to violation of 18 U.S.C. § 2252(a)(4)(B), possession of material involving sexual exploitation of minors. On June 23, 2014, the district court sentenced Mr. Manrique to 72 months imprisonment, lifetime supervised release, and announced "restitution is mandatory." DE 61:38.

A Judgment in a Criminal Case was filed the next day, June 24, 2014. It recites the terms of imprisonment and supervised release, and states that, "The determination of restitution is deferred until 8/22/2014. An Amended Judgment in a Criminal Case (AO245C) will be entered after such determination." App. C; DE 53:5. A notice of appeal was filed on July 8, 2014, directed to the final judgment and sentence. DE 55. The appeal was docketed by the Court of Appeals under Case No. 14-13029. App. F.

The district court entered a second Judgment in a Criminal Case, dated September 18, 2014, following a hearing on restitution. The second judgment is the same as the first in all respects except it specifies the dollar amount of restitution – $4,500 – and the manner in which it should be paid. App. D.; DE 67:5. Four days later, on September 23, 2014, the district court clerk transmitted the amended judgment to the Court of Appeals, which filed it on the docket of the appeal already pending in that court. App. F.

B. Court of Appeals Proceedings.

Mr. Manrique's appeal of the judgment was initiated by the filing of a notice of appeal on July 8, 2014, DE 55, following entry of the first judgment. The second judgment including restitution was filed on the docket of the pending appeal on September 23, 2014. See COA Docket Sheet, Case No. 14-13029 (Sept. 23, 2014) ("USDC Restitution Order as to Appellant Marcelo Manrique was filed on 9/18/2014. Docket Entry 67"). All transcripts of proceedings, including the restitution proceeding, were prepared and filed in the Court of Appeals before the Court of Appeals' Clerk issued a first briefing notice, about two months after the second judgment had been entered. App. F.

The parties thereafter briefed the issues on appeal, including a challenge to the restitution portion of the sentence, between December 2014 and February 2015, months after both judgments had been entered and filed in the Court of Appeals under the single case number. At no time did the government challenge the Court of Appeals' jurisdiction over the restitution portion of the sentence, nor did the government allege it suffered any prejudice from a single notice of appeal.

The Court of Appeals addressed and affirmed appellate challenges to the sentence of imprisonment and lifetime term of supervised release, but determined – sua sponte – that it lacked jurisdiction to decide the restitution issue because the appellant did not file a second notice of appeal in the same pending appeal once the second judgment was entered. There was neither briefing nor oral argument on the

jurisdictional issue raised for the first time in the Court of Appeals' opinion. App. A (July 15, 2015).

Mr. Manrique filed a petition for rehearing and rehearing en banc, which challenged the Court of Appeals' sua sponte decision that it lacked jurisdiction over the restitution question. The Court of Appeals denied rehearing and rehearing en banc on September 11, 2015. App. B. This timely petition for writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

Mr. Manrique's petition involves the fairly common practice of deferred restitution judgments, as permitted by the Court's decision in Dolan v. United States, 560 U.S. 605 (2010); the interaction of such judgments with rules of appellate procedure; and the jurisdictional prerequisites to appeal deferred restitution awards. The possibility of these logistical concerns was perceived by the Court in Dolan, but left to be addressed later. The time for resolution has arrived, as this case and a significant circuit split illustrate.

The district judge in Manrique's case pronounced sentence, including terms of imprisonment and lifetime supervised release, and also announced that "restitution is mandatory." DE 61:38. A Judgment in a Criminal Case was filed the next day, reciting the terms of imprisonment and supervised release, but deferring entry of the restitution portion of the sentence. DE 53:5. The judgment states, "The determination of restitution is deferred until 9/22/14. An Amended Judgment in a Criminal Case (AO245C) will be entered after such determination." Id. A notice of appeal as to the final judgment and sentence was timely filed on July 8, 2014. DE 55. These events are typical in a deferred restitution case.[1]

---

[1] See e.g., United States v. Cheal, 389 F.3d 35, 46-47 (1st Cir. 2004) (announcing at sentencing that "[y]ou shall pay restitution," including that fact in final judgment, but deferring restitution hearing, then entering deferred amended judgment including restitution amount); United States v. Hyde, 556 F. App'x 62 n.1 (2d Cir. 2014) (entering deferred restitution judgment); United States v. Stoian, 2015 WL 5036366 (6th Cir. Aug. 12, 2015) (same); United States v. Castro, 554 F. App'x 664 (9th Cir. 2014) (same).

After the dollar amount of restitution was decided, the district court entered a second Judgment in a Criminal Case, dated September 18, 2014. The second judgment was the same as the first in all respects except it specified the dollar amount of restitution and the manner in which it should be paid. DE 67:5. Four days later the second judgment was transmitted to the Court of Appeals, which filed it on the docket of the pending appeal initiated by the notice of appeal. In the ensuing months, all transcripts and appellate briefs were filed, including full briefing on the merits of Mr. Manrique's restitution challenge. The government posited no objection to hearing the restitution challenge, nor did it argue any prejudice resulting from hearing the restitution issue in conjunction with the appeal of the term of imprisonment and supervised release.

The Court of Appeals refused to decide Mr. Manrique's appeal of the restitution aspect of his criminal sentence, deciding sua sponte that it lacked jurisdiction to do so.

> We do not have jurisdiction to entertain Manrique's challenge to his restitution amount because he did not file a notice of appeal designating the amended judgment setting forth the restitution amount.

618 F. App'x at 583.

The legal determination that the Court of Appeals lacked jurisdiction is in conflict with decisions of this Court, Fed. R. App. P. 4(b)(2), and most Courts of Appeals. As a result of the decision below in Manrique, there now exists a significant split among the circuits on the jurisdiction of a Court of Appeals to hear an appeal of a deferred restitution judgment entered during the pendency of a criminal appeal.

Eight circuits – the First, Second, Third, Fourth, Fifth, Sixth, Seventh and Tenth – hold, in accordance with Rule 4(b)(2) that a premature notice of appeal in a criminal case matures upon entry of the written judgment. Two circuits hold otherwise, although with different rationales. The Eleventh Circuit holds it lacks jurisdiction unless a second notice of appeal is filed within the same pending appeal. The Ninth Circuit has held that, although it has jurisdiction in an appeal with a prematurely filed notice, it may dismiss the appeal of that issue if the government simply objects. Exacerbating this split, the First Circuit – which recognizes it has jurisdiction to hear such an appeal without a second notice of appeal (joining with eight other circuits) – notes that the timeliness of the notice may be uncertain, so it has prospectively ordered that future restitution awards should be followed by a second notice of appeal.

In the specific context of premature notices of appeal of deferred restitution judgments, the circuits are similarly split, 4-1 in favor of jurisdiction, but due to one circuit's ambivalence, the split may be 3-2, as explained more fully in subsection B, infra. One thing is clear: The jurisdictional and procedural prerequisites relating to the appeal of a restitution award are hopelessly unclear, varying from circuit to circuit.

A. Premature notices of appeal in criminal cases mature pursuant to Fed. R. App. P. 4(b)(2).

Fed. R. App. P. 4(b)(2) allows that "[a] notice of appeal filed after the court announces a decision, sentence or order – but before entry of the judgment – is treated as filed on the date of and after entry." The rule incorporates the Court's decision in Lemke v. United States, 346 U.S. 325 (1953) (per curiam) and decisions of the circuits

that a premature notice of appeal matures or springs forward when the judgment under review is entered.

In Lemke v. United States, the Court considered the jurisdictional significance of Fed. R. Crim. P. 37, the predecessor to Fed. R. App. P. 4(b)(2). Lemke filed his notice of appeal after sentencing, but three days before the judgment in a criminal case was entered. No notice of appeal was filed after that time. In a divided decision, the Court of Appeals dismissed the appeal due to the premature notice of appeal. One judge dissented, concluding that "the notice of appeal, though premature, was not a nullity. I think the defect and irregularity here is of the sort we are required to disregard by Criminal Rule 52(a)." Lemke v. United States, 203 F.2d 406, 407 (9th Cir. 1953) (Pope, J., dissenting), cert. granted and remanded, 346 U.S. 325 (1953). This Court granted certiorari and remanded, noting that the notice of appeal was still on file when the judgment was entered, and holding – consistent with Judge Pope's dissent – that the "irregularity is governed by Rule 52(a) which reads 'Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.'" 346 U.S. 325.

"The holding of Lemke was incorporated into Rule 37's successor, Fed. R. App. P. 4(b)." United States v. Malcom, 114 F.3d 1190 (6th Cir. 1997) (unpublished) (holding premature notice of appeal in criminal case is valid and matures to cover later-filed judgment, absent prejudice to the government) (citing 16A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, et al. Federal Practice & Procedure Jurisdiction § 3950.11 (4th ed. Apr. 2015)). Wright & Miller recounts the direct connection between Rule 37 and Rule 4(b)(2):

> The predecessor to Rule 4(b)(2) entered the Criminal Rules in the 1966 amendments to Criminal Rule 37(a)(2). When the Appellate Rules took effect in 1968, Rule 37(a)(2)'s premature-notice provision was incorporated into Rule 4(b) without any change in substance. The provision was re-worded in 1993. As part of the 1998 restyling of the Appellate Rules, the provision was placed in subdivision (b)(2). As of 2008, Rule 4(b)(2) provides that "[a] notice of appeal filed after the court announces a decision, sentence, or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

Id. at § 3950.11 (footnote omitted).

Rule 4(b)(2) ripening is applicable to deferred restitution judgments in criminal cases, as explained by the Second Circuit's decision in Hyde v. United States, 556 F. App'x at 62 n.1:

> Hyde filed his notice of appeal on November 9, 2012, after the district court entered its original judgment on November 2, 2012. The district court did not determine the amount of restitution until it entered an amended judgment on February 22, 2013. Hyde did not, however, file a new notice of appeal from the amended judgment. The government does not contest the timeliness of Hyde's appeal. While Hyde's notice of appeal was likely effective with respect to the original judgment, we conclude that it "ripened into an effective notice" of appeal from the amended judgment as well. United States v. Kapelushnik, 306 F.3d 1090, 1093–94 (11th Cir. 2002); see also Zeno v. Pine Plains Cent. Sch. Dist., 702 F.3d 655, 663 n. 6 (2d Cir. 2012)("Although [appellant] filed a premature notice of appeal, because the district court entered an amended final judgment before the appeal was heard and [appellee] suffered no prejudice, the jurisdictional defect has been cured.").

Hyde at 63 n.1.[2]

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[2] It is important to distinguish between the ripening clause of Fed. R. App. P. 4(b)(2), which relates to criminal appeals, and the similar provision in Rule 4(b)(1), relating solely to civil appeals. The 1993 amendment to Rule 4 effected a substantial change for civil cases, although it simply reiterated the law applying to criminal appeals. Prior to the 1993 rules amendment, Rule 4(b)(1) (civil appeals) provided that "[a] notice of appeal filed before the disposition of any of the [designated post-trial] motions shall have no effect." Fed. R. App. P. 4(a)(4) (1979). This Court had interpreted

Hyde relied in part on the Eleventh Circuit's Kapelushnik decision, abrogated below by Manrique, which causes an inherent circuit split. As explained in the next subsection, the Manrique decision forges a significant split in authority with other circuits, as well.

B. Manrique's holding exacerbates a significant circuit split.

Consistent with Lemke, and Rule 4(b)(2), eight circuits have expressly acknowledged the vitality of a premature notice of appeal in a criminal case. United States v. Cheal, 389 F.3d 35 (1st Cir. 2004) (holding premature notice of appeal filed after sentencing, but before restitution was ordered, was sufficient, where both parties fully briefed the restitution issue and there was no question of government surprise or prejudice); Hyde v. United States, 556 F. App'x 62, 63 n.1 (2d Cir. 2014) (holding that original notice of appeal of criminal judgment ripened into an effective notice from the amended judgment designating restitution); United States v. Andrews, 681 F.3d 509,

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that provision in a civil case as making such a notice of appeal a "nullity, . . . as if no notice of appeal were filed at all." Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 61 (1982). The 1993 amendment replaced the "nullity" rule in civil appeals with a rule that recognizes ripening of a premature notice of appeal. See Fed. R. App. P. 4(b)(2) advisory committee's note (1993). The committee's note explains the provision was written to eliminate the "trap" that previously resulted in a civil appeal if an unsuspecting litigant did not file a second notice of appeal if an amended judgment was entered while the appeal was pending under the original notice of appeal.

Although this eliminated the trap in civil cases, the trap never existed in criminal appeals. The 1993 amendment to Rule 4(b)(2) (criminal appeals) simply codified prior precedents of this Court and the circuits, which had recognized that a premature notice of appeal in a criminal case does not deprive a court of appeals of jurisdiction to hear an appeal of the judgment and sentence.

516 n.2 (3rd Cir. 2012) (holding premature notice of appeal deemed filed as of date final judgment was later entered); United States v. Thornton, 1 F.3d 149, 157-58 (3rd Cir. 1991) (holding Court of Appeals had jurisdiction over appeals of post-trial motions, despite premature notice of appeal, because parties had fully briefed the issues without any claim of prejudice); United States v. Bly, 510 F.3d 453, 457 n.6 (4th Cir. 2007) (holding Court of Appeals had jurisdiction, despite premature notice of appeal, based on Rule 4(b)(2) because it "is deemed to be 'filed on the date of and after entry'"); United States v. Winn, 948 F.2d 145, 155 (5th Cir. 1991) (holding that, absent prejudice, Court of Appeals would hear challenges to both judgment and sentence despite premature notice of appeal); United States v. Baker, 559 F.3d 443, 447 n.2 (6th Cir. 2009) (holding Court of Appeals had jurisdiction over premature notice of appeal filed after sentencing, but before judgment entered); United States v. Stoian, 2015 WL 5036366 (6th Cir. Aug. 12, 2015) (holding notice of appeal timely filed as to final judgment "spring[s] forward" to confer jurisdiction on deferred judgment regarding restitution) (relying on United States v. Malcolm, 114 F.3d 1190 at *6 (6th Cir. 1997) (unpublished) and the Eleventh Circuit's since-abrogated decision in Kapelushnik, 306 F.3d at 1093-94); United States v. Cantero, 995 F.2d 1407, 1408 n.1 (7th Cir. 1993) (holding that Rule 4(b)(2) permits notice of appeal to be filed after sentencing, but before entry of final judgment); United States v. Walker, 915 F.2d 1463, 1465 (10th

Cir. 1990) (holding premature notice of appeal filed before sentencing ripens when judgment is formally finalized, conferring jurisdiction on Court of Appeals).[3]

As noted above, Hyde relied in part on the Eleventh Circuit's decision in Kapelushnik, the decision the Eleventh Circuit abrogated in its Manrique decision below. Until the Manrique decision abrogated its prior precedent, the Eleventh Circuit also held that a premature notice of appeal matures upon the filing of the final judgment. See United States v. Kapelushnik, 306 F.3d at 1090 (holding that "once the judgments of conviction [including restitution] became final, the Government's premature notice of appeal ripened into an effective notice as of that date.") (citing United States v. Curry, 760 F.2d 1079, 1079-80 (11th Cir. 1985) (holding that, where defendant filed notice of appeal after verdict but before sentencing, "premature notice of appeal is effective to perfect appeal as of the date the sentence is entered as the judgment."); United States v. Quincoces, 503 F. App'x 800, 802 (11th Cir. 2013) (holding that, where district court's restitution order was not final when timely notice of appeal was filed, it "ripened into an effective notice of appeal on the date the district

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[3] Another distinction between the civil and criminal subsections of Rule 4 supports this conclusion. "While the appellate rules specifically require an appellant in a civil case to file an amended notice if he wishes to bring certain post-judgment motions within the scope of his appeal, see Fed. R. App. P. 4(a)(4), there is no parallel provision for criminal cases." Malcolm, 114 F.3d at *7. As Malcolm explained, several circuits have reasoned that this distinction implies that an appellant in a criminal case is under no duty to amend his notice of appeal, so long as the government is not prejudiced thereby. Id., citing United States v. Thornton, 1 F.3d at 157-58 (3d Cir.); United States v. Winn, 948 F.2d at 155 (5th Cir.); United States v. Walker, 915 F.2d at 1465 (10th Cir.); see also,16 A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3950.11 at 253-54 (2d ed. 1996).

court made its final restitution determination") (citing Kapelushnik). Manrique incorrectly overruled that precedent.

The Eleventh Circuit professed that the change in its precedent was driven by this Court's decision in Dolan v. United States:

> We previously held an appeal from a sentencing judgment that deferred restitution was premature and did not ripen until the district court either (1) ordered restitution or (2) lost the power to do so after 90 days. See United States v. Kapelushnik, 306 F.3d 1090, 1093-94 (11th Cir. 2002). However, the Supreme Court later held "[t]he fact that a sentencing court misses the statute's 90-day deadline . . . does not deprive the court of the power to order restitution." Dolan v. United States, 560 U.S. 605, 611 (2010). We subsequently recognized, in light of Dolan, the Kapelushnik framework created an injustice because it was possible for an appeal to never ripen, and addressed whether judgments that deferred the issue of restitution were nevertheless final for appellate jurisdiction purposes. United States v. Muzio, 757 F.3d 1243, 1246 (11th Cir.), cert. denied 135 S. Ct. 395 (2014).

Manrique, 618 F. App'x at 582-83. Although this explains the need for the Court of Appeals to recognize its jurisdiction over the initial judgment, it does not explain or justify ignoring Rule 4(b)(2) ripening as to the deferred restitution judgment.

By expressly abrogating Kapelushnik, in its decision below, the Eleventh Circuit has created a serious split with the Court's decision in Lemke, Rule 4(b)(2), and the uniform holdings of eight other circuits. The only other circuit that has failed to give effect to Rule 4(b)(2) ripening is the Ninth Circuit, in United States v. Castro, 554 F. App'x 664 (9th Cir. 2014), which held that a timely notice of appeal from a final judgment, filed before the restitution award, should be dismissed where the government objects to untimeliness in its answer brief. Although Castro acknowledges that the timeliness requirement is not jurisdictional – so in that sense it differs from

the Eleventh Circuit's decision below – it refused to give effect to the ripening clause of Rule 4(b). Adding another dimension to the circuit split is the First Circuit's decision in United States v. Cheal. Although Cheal acknowledges no jurisdictional barrier to a single notice of appeal, the First Circuit is uncertain about timeliness, so it recommends a best practice to be applied prospectively: "[L]ooking to the future, we think that, as a general proposition, a deferred restitution order entered pursuant to § 3664(d)(5), subsequent to a final judgement of conviction which has been directly appealed, should be the subject of a second notice of appeal." 389 F.3d at 51, 52.

Focusing specifically on the interaction of Rule 4(b)(2) and deferred restitution judgments, as here, the circuit split is equally problematic. In this more focused context, the circuits split 4-1 on the jurisdiction of a Court of Appeals to decide a restitution challenge based solely on the filing of a premature notice of appeal. Four circuits recognize their jurisdiction – the First (Cheal), Second (Hyde), Sixth (Stoian), and Ninth (Castro) – while the Eleventh (Manrique) holds that it lacks jurisdiction. But even that circuit split can arguably be counted differently, as 3-2, because although the Ninth Circuit recognized its jurisdiction in Castro it still refused to give effect to Rule 4(b)(2) ripening. And, although Cheal stands with the majority of circuits on jurisdiction and ripening, the First Circuit is uncertain enough to advise a practice contrary to what Rule 4(b)(2) expressly authorizes.

Thus, the circuit division is manifest: Most circuits recognize and give effect to the ripening clause, while two do not, and one of the circuits recognizing ripening

recommends a practice at odds with Rule 4(b)(2) because it is uncertain about the interaction of appellate rules in the aftermath of Dolan.

To be sure, the Eleventh Circuit's Manrique decision is the outlier, at odds even with its own prior precedent. In United States v. Quincoces, 503 F. App'x 800, 802 (11th Cir. 2013), for example (now abrogated along with Kapelushnik), the Eleventh Circuit had relied on Kapelushnik and Rule 4(b)(2) to hold that a premature notice of appeal ripened to cover a deferred restitution judgment. 503 F. App'x at 508. Following its decision in Manrique, however, the Eleventh Circuit's position is expressly in conflict with the Court's decision in Lemke, Rule 4(b)(2), and the majority of other circuits.

C. Manrique's jurisdictional determination is wrong.

The holding below is ostensibly premised on the Eleventh Circuit's recent decision in United States v. Muzio, 757 F.2d 1243 (11th Cir.), cert. denied 135 S. Ct. 395 (2014), which altered circuit precedent following this Court's decision in Dolan v. United States, 560 U.S. 605, 611 (2010). Yet, the Court's decision in Dolan neither requires, nor counsels in favor of, abandoning the existing premature notice rule. Neither does the Eleventh Circuit's corrective opinion in Muzio. The decision below misapprehends Dolan and Muzio and has effectively muddled jurisdiction in criminal cases with briefly-deferred restitution hearings.

In Dolan, this Court held that the 90-day limit for ordering restitution under the Mandatory Victim Restitution Act, 18 U.S.C. § 3664(d)(5), is not ironclad or jurisdictional. 560 U.S. at 608. As a result, a district court is permitted to take longer

in making its restitution award. The decision says nothing about the timeliness of a notice of appeal, or that the decades of precedent under Rule 4(b)(2) was altered in any way. The Court "le[ft] all such matters for another day." 560 U.S. at 618.

Prior to the Court's decision in Dolan, the Eleventh Circuit would not permit a criminal appeal to go forward until restitution was ordered. Under the Kapelshunik formulation, the Court of Appeals lacked jurisdiction over the appeal until a final judgment of restitution was entered, which should occur within 90 days under the statute. The flaw in that formulation was illuminated in Muzio.

The district court in Muzio had entered a judgment sentencing the defendant to imprisonment and stating restitution would be ordered in 90 days, with entry of a new judgment. Restitution was eventually ordered, but no new judgment was filed. Muzio only sought to appeal the sentence of incarceration, not restitution. The question presented was whether Muzio could proceed with his appeal of the sentence, or had to wait for a restitution judgment that might never come. Under Kapelushnik, the judgment was not deemed final so the appeal had to wait. But this could go on indefinitely.

This Court's decision in Dolan makes clear that the balance of the judgment imposing sentence was separately final for purposes of appeal, even if the restitution award has not yet occurred. 560 U.S. at 617-18. The holding in Dolan abrogated the portion of Kapelshunik that said otherwise. To conform, the Eleventh Circuit in Muzio receded from that portion of Kapelshunik, holding instead that a defendant could appeal his judgment and sentence in either of two ways: (1) in a single proceeding, or,

(2) in a separate appeal, based on a second notice of appeal. See 775 F.3d at 1250, 1254 n.13. In reaching this decision, both of Muzio's majority opinions refused to decide whether a second notice of appeal was required or the first one ripened, because it did not matter in that case: Muzio did not seek to challenge the restitution portion of his sentence, so it made no difference if the premature notice ripened to cover restitution or not. 757 F.3d at 1247 n.3 (Wilson, J.); id. at 1260 n.4 (Coogler, J., concurring).[4] Thus, Muzio did not affect the ripening portion of Kapelushnik's holding; that portion of the Eleventh Circuit's precedent should have remained intact.

The decision below overlooked that Muzio did not overrule that portion of Kapelushnik that recognizes Rule 4(b)(2) ripening. Indeed, neither Dolan nor Muzio holds that a separate appeal is necessary in all cases, or that Rule 4(b)(2) is inapplicable to appeals of restitution awards where the district judge announces at sentencing that restitution is mandatory.

Nevertheless, the Eleventh Circuit decision below holds that Mr. Manrique was required to file two notices of appeal in the same appeal, in order to contest both the

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[4] The three opinions in Muzio each state that the decision does not address Rule 4(b)(2) ripening. The dissent in Muzio criticized the majority for failing to address the question of whether the defendant's premature notice of appeal ripened into an operative notice of appeal when the second judgment (including restitution) was entered. 757 F.3d at 1268 (Tjoflat, J., dissenting). The majority opinions responded that ripening was irrelevant in that case because Muzio did not challenge the restitution award. 757 F.3d at 1247 n.3 (Wilson, J.) and at 1260 n.4 (Coogler, J., concurring) ("As explained in footnote three of the Majority opinion, we are not reviewing the November restitution order because Muzio did not make his restitution proceeding the subject of this appeal. As such, we need not consider the question the dissent focuses on . . . .").

original judgment in a criminal case, as well as the amended judgment, which merely added the specifics of restitution expressly reserved by the written terms of the original judgment. Although a separate notice of appeal would be required for the separate-appeal option of Muzio, it is not required in the single-proceeding option due to the ripening effect of Rule 4(b)(2).

Notably, the Eleventh Circuit determined it lacked jurisdiction due to what is, at worst, a prematurely untimely notice of appeal. Yet, the timeliness of a filed notice of appeal is not an event of jurisdictional significance in a criminal case. The Eleventh Circuit supported its erroneous jurisdictional conclusion with its 2005 decision, United States v. Cartwright, 413 F.3d 1295, 1299 (11th Cir. 2005), which held that, "[a]bsent the filing of a timely notice of appeal, a Court of Appeals is 'without jurisdiction to review the decision on the merits.'" See Manrique 618 F. App'x at 583. The jurisdictional premise of Cartwright is contrary, however, to this Court's subsequent decision in Bowles v. Russell, 551 U.S. 205 (2007), which abrogated Cartwright's conclusion that a timely notice of appeal is jurisdictional in criminal cases. See United States v. Lopez, 562 F.3d 1309, 1312-13 (11th Cir. 2009) ("Because the deadline in Rule 4(b) for a defendant to file a notice of appeal in a criminal case is not grounded in a federal statute, we hold that it is not jurisdictional.") (recognizing that prior Circuit precedent to the contrary was abrogated by the Supreme Court's decision in Bowles v. Russell).

Consequently, the Eleventh Circuit's holding that "[w]e do not have jurisdiction to entertain Manrique's challenge to his restitution amount because he did not file a

notice of appeal designating the amended judgment setting forth the restitution amount" misapprehends and overlooks the express language of Rule 4(b)(2), the portion of Kapelushnik's holding that remains intact despite Muzio, and the governing jurisdictional jurisprudence of Bowles and Lopez.

As this Court's decision in Lemke holds, the Court of Appeals has jurisdiction over a premature notice of appeal. The question is not one of jurisdiction, but rather whether substantial rights have been affected under Fed. R. Crim. P. 52(a). Here the government has made no such claim, nor could it, for the question of restitution was fully briefed by both parties in due course of the pending appeal.

D. Manrique incorrectly refused to decide the appeal of a restitution award in a deferred judgment case.

The sentencing proceeding below is notable because it illustrates how the notice of appeal captured restitution both in the first instance, and as amended to flesh out the dollar amount. The events below also demonstrate that the absence of a second notice of appeal in the same appellate case did not affect the government's substantial rights one whit.

In his oral pronouncement of sentence, the district judge specifically announced that restitution was mandatory. Those words included restitution in the sentence from the very first. The first written judgment then incorporated the oral pronouncement including restitution, but noted that the amount of restitution would be decided at a future date, followed by an amended judgment to reflect this. Both the oral pronouncement and the original written judgment ordered restitution (albeit sans a

dollar amount) and the written judgment spoke to the fact that a more specific amended judgment would be filed. When the defendant filed a timely notice of appeal as to the first judgment, it followed both the oral pronouncement that restitution is mandatory and the written judgment that the precise amount would be designated in an amended judgment. Thus, the original notice of appeal captured that portion of the sentence involving restitution and the language in that original judgment relating to a future amended judgment. See United States v. Cheal, 389 F.3d at 46-46, 53 (holding that where sentencing judge announced, "[y]ou shall pay restitution," but written judgment deferred restitution award, single notice of appeal from original judgment gave Court of Appeals jurisdiction to hear appeal of amended restitution judgment); United States v. Hyde (same); United States v. Stoian (same).

The notice of appeal captured the original judgment and it ripened under Rule 4(b)(2) to include the amended judgment mentioned in the original judgment, once the second judgment was entered. All parties and the clerk of the Court of Appeals understood that. All transcripts, orders and briefs were filed in the single appellate case, and both parties fully briefed the restitution issue, without objection or misunderstanding. Under the proper Rule 52(a) standard, a Court of Appeals should have proceeded to determine the merits of the restitution challenge on appeal. Yet, one circuit holds it lacks jurisdiction to do so (the Eleventh in Manrique); one (the Ninth in Castro) would have dismissed it if the government had simply objected based on timeliness, without addressing substantial rights; three circuits would have addressed the restitution issue (the First in Cheal, Second in Hyde, and Sixth in Stoian); but,

then again, the First Circuit in Cheal recognizes the uncertainty, so it recommends a second notice of appeal even though it is jurisdictionally unnecessary and it has no impact on substantial rights.

E. Manrique is an ideal vehicle to address the problematic interactions between deferred restitution judgments and appellate time limits, questions reserved by the Court's decision in Dolan.

In Dolan, this Court acknowledged the possibility of problematic interactions between deferred restitution orders and appellate time limits, but did not decide those questions because Dolan did not seek to appeal both the initial and amended judgments. Id., 560 U.S. at 618 (noting "the fact that the interaction of restitution orders with appellate time limits could have consequences extending well beyond cases like the present one (where there was no appeal from the initial conviction and sentence)," but "leav[ing] all such matters for another day.")

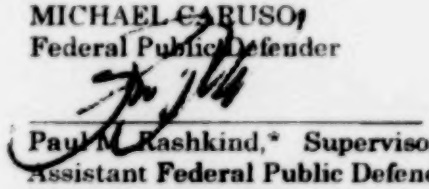
The Manrique decision exposes the questions Dolan perceived, but left unanswered, about the interaction of deferred restitution orders and appellate time limits. Moreover, this interaction illuminates a serious circuit split about how to accommodate it. As a result, Mr. Manrique's petition is an ideal vehicle for the Court to determine one of the issues it reserved in Dolan, the procedural requirements to perfect appeal of a deferred restitution judgment entered during a pending appeal of the judgment and sentence.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari.

Respectfully submitted,

MICHAEL CARUSO
Federal Public Defender



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APPENDIX

APPENDIX

Decision of the Court of Appeals for the Eleventh Circuit, United States v. Marcelo Manrique, 618 F. App'x 579 (11th Cir. 2015) .... A

Order of the Court of Appeals for the Eleventh Circuit Denying Rehearing and Rehearing En Banc (Sept. 11, 2015), ... B

Judgment imposing sentence (June 24, 2014) C

Judgment imposing sentence (Sept. 18, 2014) ..... D

Information and Waiver of Indictment ..... E

Docket of Court of Appeals, Case No. 14-13029 ..... F

EXHIBIT A

618 Fed.Appx. 579
United States Court of Appeals,
Eleventh Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.
Marcelo MANRIQUE, Defendant–Appellant.

No. 14–13029 | Non–Argument Calendar. | July 15, 2015.

Synopsis

Background: Defendant pleaded guilty in the United States District Court for the Southern District of Florida to possession of material involving a minor engaging in sexually explicit conduct.

Holdings: Defendant appealed. the Court of Appeals held that:

[1] district court sufficiently explained its reasons for imposing life term of supervised release;

[2] life term of supervised release was substantively reasonable; and

[3] Court of Appeals lacked jurisdiction to entertain defendant's challenge to his restitution amount.

Affirmed.

West Headnotes (3)

[1] **Sentencing and Punishment**
↩ Sufficiency

District court's explanation for imposing life term of supervised release on defendant who pled guilty to possession of material involving a minor engaging in sexually explicit conduct, that it did not think defendant was a danger to recidivate and the sentence was sufficient but not excessive to perform a deterrent function, was sufficient to demonstrate the court considered the parties' arguments and had a reasoned basis for exercising its authority, in light of fact the court imposed a Guidelines term of supervised release. 18 U.S.C.A. § 3553(a); U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

Cases that cite this headnote

[2] **Sentencing and Punishment**
↩ Obscenity and lewdness

Sentencing and Punishment
↩ Effect of statute or guideline

Defendant's life term of supervised release for possession of material involving a minor engaging in sexually explicit conduct was substantively reasonable; district court weighed the statutory sentencing factors when deciding on a sentence, it specifically discussed the need for deterrence balanced with its belief defendant was not a recidivism risk, sentence imposed was within the Guidelines range, and sentence was in accord with Guidelines' recommendation that supervised release term be the statutory maximum. 18 U.S.C.A. §§ 2252, 3553(a); U.S.S.G. § 5D1.2(b)(2), 18 U.S.C.A.

Cases that cite this headnote

[3] **Criminal Law**
↩ Form and requisites

Defendant, who pled guilty to possession of material involving a minor engaging in sexually explicit conduct, did not file a notice of appeal designating district court's amended judgment setting forth the restitution amount, as required for Court of Appeals to have jurisdiction to entertain defendant's challenge to his restitution amount; defendant appealed only the original judgment, which deferred determination of the restitution amount.

Cases that cite this headnote

Attorneys and Law Firms

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Raymond D'Arsey Houlihan, III, Michael Caruso, Federal Public Defender, Vanessa Louise Chen, Federal Public Defender's Office, Miami, FL, for Defendant–Appellant.

Appeal from the United States District Court for the Southern District of Florida. D.C. Docket No. 1:14–cr–20064–JEM–1.

Before TJOFLAT, WILSON and BLACK, Circuit Judges.

Opinion

PER CURIAM:

Marcelo Manrique appeals his life term of supervised release and the restitution award ordered after he pled guilty to one count of possession of material involving a minor engaging in sexually explicit conduct, *581 in violation of 18 U.S.C. § 2252(a)(4)(B) and (b)(2). On appeal, he argues: (1) the district court erred procedurally in imposing a life term of supervised release because it failed to adequately explain the sentence and consider the required 18 U.S.C. § 3553(a) factors; (2) the life term of supervised release was substantively unreasonable; and (3) the district court imposed an erroneous restitution amount. We will address each of these contentions in turn. After review, we affirm.

I. DISCUSSION

As the parties are familiar with the facts of this case, we will not recount them in detail. We include only those facts necessary to the discussion of each issue.

A. Procedural Reasonableness

The reasonableness of a sentence is generally reviewed through a two-step process. *United States v. Pugh*, 515 F.3d 1179, 1190 (11th Cir.2008). The first step is to "ensure that the district court committed no significant procedural error such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence." *Gall v. United States*, 552 U.S. 38, 51, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007).

[1] Manrique did not clearly articulate an objection to his sentence on procedural grounds, and therefore we review his procedural reasonableness claim for plain error. *See United States v. Vandergrift*, 754 F.3d 1303, 1307 (11th Cir.2014) (stating when a party does not clearly articulate an objection on procedural grounds at the time of sentencing, plain error review is appropriate). The record shows the district court stated it had considered the § 3553(a) factors before announcing its total sentence, and added it thought the sentence was fair in light of all of the § 3553(a) factors. Additionally, the court stated it had considered the parties' arguments-such as Manrique's argument in favor of a 15–year term of supervised release. Moreover, Manrique does not argue the court improperly calculated or failed to calculate the Guidelines range, and the record reflects the court referred to the Guidelines as advisory, indicating it did not treat them as mandatory. Manrique also does not point to any clearly erroneous facts upon which the district court based his term of supervised release, nor does the record reveal any. As to Manrique's argument the district court did not adequately explain the sentence, the court explained it did not think Manrique was a danger to recidivate and the sentence was sufficient but not excessive to perform a deterrent function. Considering the court imposed a Guidelines term of supervised release, the explanation was sufficient to demonstrate the court considered the parties' arguments and had a reasoned basis for exercising its authority. *See Rita v. United States*, 551 U.S. 338, 356, 127 S.Ct. 2456, 168 L.Ed.2d 203 (2007) ("The sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority."). For the foregoing reasons, Manrique cannot show plain error. *United States v. Rodriguez*, 398 F.3d 1291, 1298 (11th Cir.2005) (stating under plain error review, there must be (1) an error, (2) that is plain, (3) that affect the defendant's substantial rights, and (4) seriously affects the fairness or integrity of the judicial proceedings).

*582 *B. Substantive Reasonableness*

The second step when determining the reasonableness of a sentence is review for substantive reasonableness. *United States v. Talley*, 431 F.3d 784, 788 (11th Cir.2005). Substantive reasonableness review seeks to "evaluate whether the sentence imposed by the district court fails to achieve the purposes of sentencing as stated in section 3553(a)." *Id.* The court must impose a sentence "sufficient, but not greater than necessary to comply with the purposes" listed in § 3553(a)(2), including the need to reflect the seriousness of the offense, deter criminal conduct, and protect the public from the defendant's future criminal conduct. *See*

18 U.S.C. § 3553(a)(2). In imposing a particular sentence, the court must also consider the nature and circumstances of the offense, the history and characteristics of the defendant, the kinds of sentences available, the applicable Guidelines range, pertinent policy statements, the need to avoid unwarranted sentencing disparities, and the need to provide restitution to victims. *Id.* § 3553(a)(1), (3)-(7).

The Sentencing Guidelines state the term of supervised release may be up to life if the offense at issue is a sex offense, and recommend the statutory maximum term of supervised release if the offense of conviction is a sex offense. U.S.S.G. § 5D1.2(b)(2). The statutorily authorized term of supervised release for a § 2252 offense is five years to life. 18 U.S.C. § 3583(k).

[2] The record shows the district court weighed the § 3553(a) factors when deciding on a sentence, and it was not necessary for it to lay them out one by one. *See United States v. Robles*, 408 F.3d 1324, 1328 (11th Cir.2005) (stating district courts do not have to conduct an accounting of every § 3553(a) factor and explain the role each played in the sentencing decision). Still, it specifically discussed the need for deterrence balanced with its belief Manrique was not a recidivism risk. Even if the court favored some factors over others, it was within its discretion to do so. *See United States v. Brown*, 772 F.3d 1262, 1267 (11th Cir.2014) (stating it is within the court's discretion to afford one factor greater weight). Furthermore, the sentence imposed by the district court was within the Guidelines range, and was in accord with the Guidelines' recommendation that the supervised release term be the statutory maximum, which indicates reasonableness. *See Talley*, 431 F.3d at 788 ("[W]hen the district court imposes a sentence within the advisory Guidelines range, we ordinarily will expect that choice to be a reasonable one."). Based on the foregoing, the district court's decision to impose a life term of supervised release does not leave a "definite and firm conviction" that it committed a clear error in judgment. *See United States v. Irey*, 612 F.3d 1160, 1190 (11th Cir.2010) (en banc) (stating we will vacate a sentence imposed by a district court only when left with a "definite and firm conviction that the district court committed a clear error of judgment").

C. Restitution

We must resolve jurisdictional issues before addressing the merits of underlying claims, and have an obligation to review *sua sponte* whether we have jurisdiction. *United States v. Cartwright*, 413 F.3d 1295, 1299 (11th Cir.2005). Absent the filing of a timely notice of appeal, we are without jurisdiction to review the decision on the merits. *Id.* We review questions regarding our subject matter jurisdiction *de novo*. *Id.*

We previously held an appeal from a sentencing judgment that deferred restitution was premature and did not ripen until ***583** the district court either (1) ordered restitution or (2) lost the power to do so after 90 days. *See United States v. Kapelushnik*, 306 F.3d 1090, 1093–94 (11th Cir.2002). However, the Supreme Court later held "[t]he fact that a sentencing court misses the statute's 90–day deadline ... does not deprive the court of the power to order restitution." *Dolan v. United States*, 560 U.S. 605, 611, 130 S.Ct. 2533, 177 L.Ed.2d 108 (2010). We subsequently recognized, in light of *Dolan*, the *Kapelushnik* framework created an injustice because it was possible for an appeal to never ripen, and addressed whether judgments that deferred the issue of restitution were nevertheless final for appellate jurisdiction purposes. *United States v. Muzio*, 757 F.3d 1243, 1246 (11th Cir.), *cert. denied* — U.S. ——, 135 S.Ct. 395, 190 L.Ed.2d 279 (2014).

In *Muzio*, the district court entered a judgment sentencing the defendant to 163 months' imprisonment and stating restitution would be ordered but the determination of the amount would be deferred for 90 days, with an amended judgment entered after such determination. *Id.* at 1245. The defendant appealed that judgment, and an amended judgment reflecting the amount of restitution was never entered. *Id.* at 1245–46. However, we determined judgment was nonetheless final for purposes of appeal because it sentenced the defendant to a term of imprisonment. *Id.* at 1247. We concluded "a judgment imposing a prison sentence and restitution but leaving the specific amount of restitution unsettled is immediately appealable." *Id.* at 1250. We acknowledged the rule could "lead to bifurcation of some defendants' cases," but stated "[i]f a subsequent judgment is entered ordering restitution, the defendant may separately appeal that order, and the appeal may be heard separately or consolidated with the initial appeal if that has not yet been resolved," or a defendant could avoid bifurcation by waiting to appeal until restitution was resolved. *Id.* As such, we held when courts enter sentencing judgments ordering restitution but deferring determination of the amount, defendants have the option to either (a) timely appeal from the initial judgment and then, if desired, timely appeal from the subsequent judgment finalizing the amount of restitution, or (b) timely appeal from the subsequent judgment only, in which case all issues will be heard in a single appeal. *Id.* at 1250 n. 9.

[3] We do not have jurisdiction to entertain Manrique's challenge to his restitution amount because he did not file a notice of appeal designating the amended judgment setting forth the restitution amount. *See Cartwright*, 413 F.3d at 1299. In his reply brief, Manrique argues *Muzio* is inapplicable because the amended judgment was never filed in that case, but *Muzio* 's discussion of a bifurcated appeals process shows its ruling also applies in situations such as this where an amended judgment was later filed. *See Muzio*, 757 F.3d at 1250. Manrique also argues his premature notice of appeal ripened following the entry of the amended judgment, but that argument relies on the *Kapelushnik* framework, which *Muzio* 's framework replaced. *See id.* at 1246. Under *Muzio*, Manrique was required to either appeal both the original judgment and the amended judgment, or appeal the amended judgment only. *Id.* at 1250 n. 9. Instead, he appealed only the original judgment. Therefore, Manrique's challenge to the restitution order is dismissed for lack of jurisdiction. *See Cartwright*, 413 F.3d at 1299.

II. DISCUSSION

Accordingly, we affirm Manrique's sentence as set forth in the district court's ***584** original judgment, and dismiss his challenge to the restitution amount reflected in his amended judgment for lack of jurisdiction.

AFFIRMED IN PART, DISMISSED IN PART.

All Citations

618 Fed.Appx. 579

End of Document

EXHIBIT B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 14-13029-BB

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

MARCELO MANRIQUE,

Defendant - Appellant.

Appeal from the United States District Court
for the Southern District of Florida

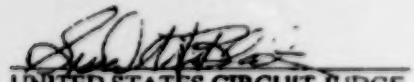
ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: TJOFLAT, WILSON and BLACK, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:



UNITED STATES CIRCUIT JUDGE

ORD-42

EXHIBIT C

UNITED STATES DISTRICT COURT

Southern District of Florida
Miami Division

UNITED STATES OF AMERICA

v.

MARCELO MANRIQUE

JUDGMENT IN A CRIMINAL CASE

Case Number: **14-20064-CR-MARTINEZ**
USM Number: **02081-104**

Counsel For Defendant: **Raymond D'Arsey Houlihan**
Counsel For The United States: **Brooke Watson**
Court Reporter: **Dawn Whitmarsh**

The defendant pleaded guilty to count(s) 1 of the Information.

The defendant is adjudicated guilty of these offenses:

TITLE & SECTION	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18 U.S.C.§ 2252(a)(4)(B)	possession of material involving the sexual exploitation of minors	01/10/2014	1

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

Date of Imposition of Sentence: **6/23/2014**

Jose E. Martinez
United States District Judge

Date: 24 June 2014

DEFENDANT: **MARCELO MANRIQUE**
CASE NUMBER: **14-20064-CR-MARTINEZ**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **72 months** as to Count One of the Information.

The court makes the following recommendations to the Bureau of Prisons: The defendant shall be assigned to a facility as close to South Florida as possible commensurate with his background and the offense of which he stands convicted.

The defendant shall surrender to the US Marshal for this District on or before June 23, 2014 at 3:15 p.m.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

_____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **MARCELO MANRIQUE**
CASE NUMBER: **14-20064-CR-MARTINEZ**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of life as to Count One.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first fifteen days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11. The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: **MARCELO MANRIQUE**
CASE NUMBER: **14-20064-CR-MARTINEZ**

SPECIAL CONDITIONS OF SUPERVISION

Adam Walsh Act Search Condition - The defendant shall submit to the U.S. Probation Officer conducting periodic unannounced searches of the defendant's person, property, house, residence, vehicles, papers, computer(s), other electronic communication or data storage devices or media, include retrieval and copying of all data from the computer(s) and any internal or external peripherals and effects at any time, with or without warrant by any law enforcement or probation officer with reasonable suspicion concerning unlawful conduct or a violation of a condition of probation or supervised release. The search may include the retrieval and copying of all data from the computer(s) and any internal or external peripherals to ensure compliance with other supervision conditions and/or removal of such equipment for the purpose of conducting a more thorough inspection; and to have installed on the defendant's computer(s), at the defendant's expense, any hardware or software systems to monitor the defendant's computer use.

Computer Possession Restriction - The defendant shall not possess or use any computer; except that the defendant may, with the prior approval of the Court, use a computer in connection with authorized employment.

Employer Computer Restriction Disclosure - The defendant shall permit third party disclosure to any employer or potential employer, concerning any computer-related restrictions that are imposed upon the defendant.

Mental Health Treatment - The defendant shall participate in an approved inpatient/outpatient mental health treatment program. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

No Contact with Minors - The defendant shall have no personal, mail, telephone, or computer contact with children/minors under the age of 18 or with the victims.

No Contact with Minors in Employment - The defendant shall not be employed in a job requiring contact with children under the age of 18 or with the victims.

No Involvement in Youth Organizations - The defendant shall not be involved in any children's or youth organization.

Restricted from Possession of Sexual Materials - The defendant shall not buy, sell, exchange, possess, trade, or produce visual depictions of minors or adults engaged in sexually explicit conduct. The defendant shall not correspond or communicate in person, by mail, telephone, or computer, with individuals or companies offering to buy, sell, trade, exchange, or produce visual depictions of minors or adults engaged in sexually explicit conduct.

Self-Employment Restriction - The defendant shall obtain prior written approval from the Court before entering into any self-employment.

Sex Offender Registration - The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense.

Sex Offender Treatment - The defendant shall participate in a sex offender treatment program to include psychological testing and polygraph examination. Participation may include inpatient/outpatient treatment, if deemed necessary by the treatment provider. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

DEFENDANT: **MARCELO MANRIQUE**
CASE NUMBER: **14-20064-CR-MARTINEZ**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$100.00	$0.00	$0.00

The determination of restitution is deferred until 8/22/2014. An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

NAME OF PAYEE	TOTAL LOSS*	RESTITUTION ORDERED	PRIORITY OR PERCENTAGE

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

**Assessment due immediately unless otherwise ordered by the Court.

DEFENDANT: **MARCELO MANRIQUE**
CASE NUMBER: **14-20064-CR-MARTINEZ**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A. Lump sum payment of $100.00 due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

This assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 08N09
MIAMI, FLORIDA 33128-7716

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

CASE NUMBER DEFENDANT AND CO-DEFENDANT NAMES (INCLUDING DEFENDANT NUMBER)	TOTAL AMOUNT	JOINT AND SEVERAL AMOUNT

The Defendant's right, title and interest to the property identified in the preliminary order of forfeiture, which has been entered by the Court and is incorporated by reference herein, is hereby forfeited.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

EXHIBIT D

UNITED STATES DISTRICT COURT

Southern District of Florida
Miami Division

UNITED STATES OF AMERICA

v.

MARCELO MANRIQUE

JUDGMENT IN A CRIMINAL CASE

Case Number: **14-20064-CR-MARTINEZ**
USM Number: **02081-104**

Counsel For Defendant: **Raymond D'Arsey Houlihan**
Counsel For The United States: **Brooke Watson**
Court Reporter: **Dawn Whitmarsh**

Date of Original Judgment: 6/23/2014
(or Date of Last Amended Judgment)

AMENDMENT REASON(S):
Modification of Restitution Order (18 U.S.C. §3664)

The defendant pleaded guilty to count(s) 1 of the Information.

The defendant is adjudicated guilty of these offenses:

TITLE & SECTION	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18 U.S.C.§ 2252(a)(4)(B)	possession of material involving the sexual exploitation of minors	01/10/2014	1

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

Date of Imposition of Sentence: **9/17/2014**

Jose E. Martinez
United States District Judge

Date: 9/18/14

DEFENDANT: MARCELO MANRIQUE
CASE NUMBER: 14-20064-CR-MARTINEZ

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **72 months** as to Count One of the Information.

The court makes the following recommendations to the Bureau of Prisons: The defendant shall be assigned to a facility as close to South Florida as possible commensurate with his background and the offense of which he stands convicted.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

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_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

_____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **MARCELO MANRIQUE**
CASE NUMBER: **14-20064-CR-MARTINEZ**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **life** as to Count One.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first fifteen days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11. The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: MARCELO MANRIQUE
CASE NUMBER: 14-20064-CR-MARTINEZ

SPECIAL CONDITIONS OF SUPERVISION

Adam Walsh Act Search Condition - The defendant shall submit to the U.S. Probation Officer conducting periodic unannounced searches of the defendant's person, property, house, residence, vehicles, papers, computer(s), other electronic communication or data storage devices or media, include retrieval and copying of all data from the computer(s) and any internal or external peripherals and effects at any time, with or without warrant by any law enforcement or probation officer with reasonable suspicion concerning unlawful conduct or a violation of a condition of probation or supervised release. The search may include the retrieval and copying of all data from the computer(s) and any internal or external peripherals to ensure compliance with other supervision conditions and/or removal of such equipment for the purpose of conducting a more thorough inspection; and to have installed on the defendant's computer(s), at the defendant's expense, any hardware or software systems to monitor the defendant's computer use.

Computer Possession Restriction - The defendant shall not possess or use any computer; except that the defendant may, with the prior approval of the Court, use a computer in connection with authorized employment.

Employer Computer Restriction Disclosure - The defendant shall permit third party disclosure to any employer or potential employer, concerning any computer-related restrictions that are imposed upon the defendant.

Mental Health Treatment - The defendant shall participate in an approved inpatient/outpatient mental health treatment program. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

No Contact with Minors - The defendant shall have no personal, mail, telephone, or computer contact with children/minors under the age of 18 or with the victim.

No Contact with Minors in Employment - The defendant shall not be employed in a job requiring contact with children under the age of 18 or with the victim.

No Involvement in Youth Organizations - The defendant shall not be involved in any children's or youth organization.

Restricted from Possession of Sexual Materials - The defendant shall not buy, sell, exchange, possess, trade, or produce visual depictions of minors or adults engaged in sexually explicit conduct. The defendant shall not correspond or communicate in person, by mail, telephone, or computer, with individuals or companies offering to buy, sell, trade, exchange, or produce visual depictions of minors or adults engaged in sexually explicit conduct.

Self-Employment Restriction - The defendant shall obtain prior written approval from the Court before entering into any self-employment.

Sex Offender Registration - The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense.

Sex Offender Treatment - The defendant shall participate in a sex offender treatment program to include psychological testing and polygraph examination. Participation may include inpatient/outpatient treatment, if deemed necessary by the treatment provider. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

DEFENDANT: **MARCELO MANRIQUE**
CASE NUMBER: **14-20064-CR-MARTINEZ**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$100.00	$0.00	**$4,500.00**

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

NAME OF PAYEE	TOTAL LOSS*	RESTITUTION ORDERED	PRIORITY OR PERCENTAGE
Marc C. Lenahan	$0.00	$4,500.00	

Restitution with Imprisonment - It is further ordered that the defendant shall pay restitution in the amount of **$4,500.00.** During the period of incarceration, payment shall be made as follows: (1) if the defendant earns wages in a Federal Prison Industries (UNICOR) job, then the defendant must pay 50% of wages earned toward the financial obligations imposed by this Judgment in a Criminal Case; (2) if the defendant does not work in a UNICOR job, then the defendant must pay a minimum of $25.00 per quarter toward the financial obligations imposed in this order.

Upon release of incarceration, the defendant shall pay restitution at the rate of 10% of monthly gross earnings, until such time as the court may alter that payment schedule in the interests of justice. The U.S. Bureau of Prisons, U.S. Probation Office and U.S. Attorney's Office shall monitor the payment of restitution and report to the Court any material change in the defendant's ability to pay. These payments do not preclude the government from using any other anticipated or unexpected financial gains, assets or income of the defendant to satisfy the restitution obligations. The restitution shall be made payable to Clerk, United States Courts, and forwarded to the address below.

The restitution will be forwarded by the Clerk of the Court to the victims on the attached list.

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

**Assessment due immediately unless otherwise ordered by the Court.

DEFENDANT: MARCELO MANRIQUE
CASE NUMBER: 14-20064-CR-MARTINEZ

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A. Lump sum payment of $100.00 due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

This assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 08N09
MIAMI, FLORIDA 33128-7716

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

CASE NUMBER DEFENDANT AND CO-DEFENDANT NAMES (INCLUDING DEFENDANT NUMBER)	TOTAL AMOUNT	JOINT AND SEVERAL AMOUNT

The Defendant's right, title and interest to the property identified in the preliminary order of forfeiture, which has been entered by the Court and is incorporated by reference herein, is hereby forfeited.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

EXHIBIT E

Jan 31, 2014

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 14-20064-CR-MARTINEZ/GARBER

18 U.S.C. § 2252(a)(4)(B) & (b)(2)
18 U.S.C. § 2253

UNITED STATES OF AMERICA

vs.

MARCELO MANRIQUE,

Defendant.
_____/

INFORMATION

The United States Attorney charges that:

On or about January 10, 2014, in Miami-Dade County, in the Southern District of Florida, the defendant,

MARCELO MANRIQUE,

did knowingly possess matter, that is, a generic desktop computer, which contained any visual depiction that had been shipped and transported using any means and facility of interstate and foreign commerce, and in and affecting interstate and foreign commerce, and which was produced using materials which have been so shipped and transported, by any means, including by computer, and the production of such visual depiction having involved the use of a minor engaged in sexually explicit conduct, as defined in Title 18, United States Code, Section 2256(2), and such visual depiction was of such conduct, in violation of Title 18, United States Code, Section 2252(a)(4)(B) and (b)(2).

Pursuant to Title 18, United States Code, Section 2252(b)(2), it is further alleged that such visual depiction involved a prepubescent minor or a minor who had not attained twelve years of age.

CRIMINAL FORFEITURE

1. The allegations of this Indictment are re-alleged and by this reference fully incorporated herein for the purpose of alleging forfeiture to the United States of America of certain property in which the defendant, **MARCELO MANRIQUE**, has an interest.

2. Upon conviction of a violation of Title 18, United States Code, Section 2252, as alleged in this Indictment, the following property will be forfeited to the United States pursuant to Title 18, United States Code, Section 2253:

(a) any visual depiction of a minor engaged in sexually explicit conduct, and any book, magazine, periodical, film, videotape, or other matter which contains any such visual depiction, which was produced, transported, mailed, shipped or received in violation of Chapter 110, Title 18, United States Code;

(b) any property, real or personal, constituting or traceable to gross profits or other proceeds which the defendant obtained from such violation; and

(c) any property, real or personal, used or intended to be used to commit or to promote the commission of such violation and any property traceable to such property.

3. The property which is subject to forfeiture includes, but is not limited to, the following:

(a) A generic desktop computer;

(b) A Seagate Barracuda 7200.7 160 Gbytes hard drive;

(c) A Seagate "Barracuda" 3000 GB hard drive;

(d) A Western Digital 1.0TB hard drive;

(e) A Maxxtor hard drive;

(f) A Western Digital WD200 20.0 GB hard drive; and

(g) A FUJITSU hard drive model M2684TAU.

All pursuant to Title 18, United States Code, Section 2253, and the procedures set forth at Title 21, United States Code, Section 853, as made applicable by Title 18, United States Code, Section 2253(b).

WIFREDO A. FERRER
UNITED STATES ATTORNEY

BROOKE C. WATSON
ASSISTANT UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA

vs.

MARCELO MANRIQUE,

Defendant.
_____/

CASE NO. _____

CERTIFICATE OF TRIAL ATTORNEY*

Superseding Case Information:

Court Division: (Select One)

__X__ Miami ___ Key West
___ FTL ___ WPB ___ FTP

New Defendant(s) Yes ___ No ___
Number of New Defendants ___
Total number of counts ___

I do hereby certify that:

1. I have carefully considered the allegations of the indictment, the number of defendants, the number of probable witnesses and the legal complexities of the Indictment/Information attached hereto.

2. I am aware that the information supplied on this statement will be relied upon by the Judges of this Court in setting their calendars and scheduling criminal trials under the mandate of the Speedy Trial Act, Title 28 U.S.C. Section 3161.

3. Interpreter: (Yes or No) NO
List language and/or dialect _____

4. This case will take 0 days for the parties to try.

5. Please check appropriate category and type of offense listed below:

(Check only one)			(Check only one)	
I	0 to 5 days	X	Petty	
II	6 to 10 days		Minor	
III	11 to 20 day		Misdem.	
IV	21 to 60 days		Felony	X
V	61 days and over			

6. Has this case been previously filed in this District Court? (Yes or No) NO
If yes:
Judge: Case No. _____
(Attach copy of dispositive order)
Has a complaint been filed in this matter? (Yes or No) Yes
If yes:
Magistrate Case No. 14-mj-02030-PAW
Related Miscellaneous numbers: _____
Defendant(s) in federal custody as of _____
Defendant(s) in state custody as of _____
Rule 20 from the District of _____

Is this a potential death penalty case? (Yes or No) NO

7. Does this case originate from a matter pending in the Northern Region of the U.S. Attorney's Office prior to October 14, 2003? Yes X No

8. Does this case originate from a matter pending in the Central Region of the U.S. Attorney's Office prior to September 1, 2007? Yes X No

BROOKE C. WATSON
ASSISTANT UNITED STATES ATTORNEY
Court ID No. A5501855

*Penalty Sheet(s) attached

REV 4/8/08

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PENALTY SHEET

Defendant's Name: **MARCELO MANRIQUE**

Case No: _____

Count #: 1

Possession of Child Pornography

Title 18, United States Code, Section 2252(a)(4)(B) & (b)(2)

***Max. Penalty: 20 years' imprisonment**

***Refers only to possible term of incarceration, does not include possible fines, restitution, special assessments, parole terms, or forfeitures that may be applicable.**

EXHIBIT F

General Docket
United States Court of Appeals for the Eleventh Circuit

Court of Appeals Docket #: 14-13029
USA v. Marcelo Manrique
Appeal From: Southern District of Florida
Fee Status: IFP Granted

Docketed: 07/08/2014
Termed: 07/15/2015
Case Handler: Lewis, Carol R., BB
(404) 335-6179

Case Type Information:
1) Criminal
2) Direct Criminal
3)

Originating Court Information:
District: 113C-1 : 1:14-cr-20064-JEM-1
Court Reporter: Dawn Whitmarsh
Sentencing Judge: Jose E. Martinez, U.S. District Judge
Date Filed: 01/31/2014
Date NOA Filed:
07/08/2014

Prior Cases:
None

Current Cases:
None

UNITED STATES OF AMERICA

Plaintiff - Appellee

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versus

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UNITED STATES OF AMERICA, Plaintiff - Appellee, versus MARCELO MANRIQUE, Defendant - Appellant.

07/08/2014	10 pg, 474.49 KB	CRIMINAL APPEAL DOCKETED. Notice of appeal filed by Appellant Marcelo Manrique on 07/08/2014. Fee Status: IFP Granted.
07/10/2014	1 pg, 347.33 KB	APPEARANCE of Counsel Form filed by Kathleen Salyer for USA (ECF: Kathleen Salyer)
07/10/2014	1 pg, 347.33 KB	APPEARANCE of Counsel Form filed by Kathleen Salyer for USA (ECF: Kathleen Salyer)
07/10/2014		E-filed Appearance of Counsel processed for Attorney Kathleen Mary Salyer for Appellee USA in 14-13029.
07/16/2014	1 pg, 145.93 KB	APPEARANCE of Counsel Form filed by Raymond D'Arsey Houlihan, III for Marcelo Manrique. (ECF: Raymond Houlihan)
07/16/2014	1 pg, 145.16 KB	APPEARANCE of Counsel Form filed by Michael Caruso for Marcelo Manrique. (ECF: Raymond Houlihan)
07/16/2014	3 pg, 14.55 KB	Certificate of Interested Persons and Corporate Disclosure Statement filed by Attorney Raymond D'Arsey Houlihan, III for Appellant Marcelo Manrique. On the same day the CIP is served, the party filing it must also complete the court's web-based stock ticker symbol certificate at the link here http://www.ca11.uscourts.gov/web-based-cip or on the court's website. See 11th Cir. R. 26.1-2(b). (ECF: Raymond Houlihan)
07/18/2014	1 pg, 73 KB	TRANSCRIPT INFORMATION FORM SUBMITTED by Attorney Raymond D'Arsey Houlihan, III for Appellant Marcelo Manrique. Transcript(s) ordered. (ECF: Raymond Houlihan)
07/22/2014	1 pg, 66.83 KB	TRANSCRIPT INFORMATION FORM PROCESSED. Transcript Order: Filer: Marcelo Manrique, Court Reporter: Dawn Whitmarsh, Proceeding Type and Date: Plea Hearing 04/03/2014, Sentencing 06/24/2014.
08/20/2014	1 pg, 66.58 KB	Court Reporter Acknowledgment filed. Transcript Order: Dawn Whitmarsh, 07/22/2014, Marcelo Manrique, Sentencing 06/24/2014, Plea Hearing 04/03/2014.
08/20/2014		TRANSCRIPTS FILED. Transcript Order: Court Reporter: Dawn Whitmarsh, Filer: Marcelo Manrique. Dt. all Trans. Filed: 08/12/2014, Proceeding Type and Date: Sentencing 06/24/2014, Plea Hearing 04/03/2014.
09/03/2014	3 pg, 27.37 KB	Certificate of Interested Persons and Corporate Disclosure Statement filed by Kathleen M Salyer for USA Attorney Kathleen Mary Salyer for Appellee USA. On the same day the CIP is served, the party filing it must also complete the court's web-based stock ticker symbol certificate at the link here http://www.ca11.uscourts.gov/web-based-cip or on the court's website. See 11th Cir. R. 26.1-2(b). (ECF: Kathleen Salyer)
09/19/2014	1 pg, 72.81 KB	TRANSCRIPT INFORMATION FORM SUBMITTED by Attorney Raymond D'Arsey Houlihan, III for Appellant Marcelo Manrique. Transcript(s) ordered. (ECF: Raymond Houlihan)
09/19/2014	1 pg, 66.57 KB	TRANSCRIPT INFORMATION FORM PROCESSED. Transcript Order: Filer: Marcelo Manrique, Court Reporter: Dawn Whitmarsh, Proceeding Type and Date: Other Hearings 09/17/2014.
09/23/2014	6 pg, 456.57 KB	USDC Restitution Order as to Appellant Marcelo Manrique was filed on 09/18/2014. Docket Entry 67.
10/16/2014	1 pg, 14.01 KB	Court Reporter acknowledgment not filed. Letter issued to Court Reporter Dawn Whitmarsh as to Appellant Marcelo Manrique. Transcript is due to be filed in District Court 30 days from 09/19/2014.
10/29/2014	1 pg, 14.28 KB	Transcripts were due to be filed on 10/20/2014 by Court Reporter Dawn Whitmarsh and are overdue. A 10% discount is required after 11/19/2014. A 20% discount is required after 12/19/2014.
11/14/2014		TRANSCRIPTS FILED. Transcript Order: Court Reporter: Dawn Whitmarsh, Filer: Marcelo Manrique. Dt. all Trans. Filed: 11/04/2014, Proceeding Type and Date: Other Hearings 09/17/2014.
11/14/2014	2 pg, 16.85 KB	Briefing Notice issued to Appellant Marcelo Manrique. The appellants brief is due on or before 12/15/2014. The appendix is due no later than 7 days from the filing of the appellant's brief.
12/12/2014		Over the phone extension granted by clerk. Appellants brief due on 12/15/2014; extension granted to 12/22/2014 as to Appellant Marcelo Manrique. Appendix due on 12/29/2014 as to Appellant Marcelo Manrique.
12/22/2014	40 pg, 110.55 KB	Appellant's brief filed by Marcelo Manrique. (ECF: Raymond Houlihan)
12/22/2014	66 pg, 1.1 MB	Appendix filed [1 VOLUMES] by Appellant Marcelo Manrique. (ECF: Raymond Houlihan)
12/23/2014		Received paper copies of EBrief filed by Appellant Marcelo Manrique.

12/23/2014	☐	Received paper copies of EAppendix filed by Appellant Marcelo Manrique. [1 VOLUME - 2 SETS]
12/23/2014	☐	Appellant's SEALED PSI for the Electronic ROA Program filed by Attorney Raymond D'Arsey Houlihan, III for Appellant Marcelo Manrique.
12/30/2014	☐ 1 pg, 746.9 KB	APPEARANCE of Counsel Form filed by Phillip DiRosa for USA (ECF: Phillip DiRosa)
12/30/2014	☐	Added Attorney(s) Phillip Drew DiRosa for party(s) Appellee USA, in case 14-13029.
01/14/2015	☐ 45 pg, 133.98 KB	Appellee's Brief filed by Appellee USA. (ECF: Phillip DiRosa)
01/14/2015	☐ 3 pg, 24.74 KB	AMENDED Certificate of Interested Persons and Corporate Disclosure Statement filed by Attorney Phillip Drew DiRosa for Appellee USA. On the same day the CIP is served, the party filing it must also complete the court's web-based stock ticker symbol certificate at the link here http://www.ca11.uscourts.gov/web-based-cip or on the court's website. See 11th Cir. R. 26.1-2(b). (ECF: Phillip DiRosa)
01/14/2015	☐ 1 pg, 508.34 KB	APPEARANCE of Counsel Form filed by Emily M. Smachetti for USA (ECF: Emily Smachetti)
01/14/2015	☐	Added Attorney(s) Emily M. Smachetti for party(s) Appellee USA, in case 14-13029.
01/14/2015	☐ 22 pg, 493.91 KB	Supplemental Appendix [VOLUME 1] filed by Appellee USA.--[Edited 01/30/2015 by MLS] (ECF: Phillip DiRosa)
01/15/2015	☐	Received paper copies of EBrief filed by Appellee USA.
01/15/2015	☐	Received paper copies of EAppendix filed by Appellee USA. [1 VOLUME - 2 SETS]
01/15/2015	☐	SEALED Supplemental Appendix [VOLUME 2 - 2 sets] filed by Attorney Phillip Drew DiRosa for Appellee USA. Service date: 01/14/2015 3rd party - Attorney for Appellant: Houlihan.
01/27/2015	☐	Over the phone extension granted by clerk. Reply brief due on 02/09/2015.
02/09/2015	☐ 32 pg, 99.54 KB	Reply Brief filed by Appellant Marcelo Manrique. (ECF: Raymond Houlihan)
02/10/2015	☐	Received paper copies of EBrief filed by Appellant Marcelo Manrique.
07/15/2015	☐ 1 pg, 8.57 KB	Judgment entered as to Appellant Marcelo Manrique.
07/15/2015	☐ 10 pg, 44.38 KB	Opinion issued by court as to Appellant Marcelo Manrique. Decision: Affirmed in part and Dismissed in part. Opinion type: Non-Published. Opinion method: Per Curiam.
08/04/2015	☐ 1 pg, 145.95 KB	APPEARANCE of Counsel Form filed by Rashkind, Paul M, Appellant (ECF: Paul Rashkind)
08/04/2015	☐ 33 pg, 98.12 KB	Petition for rehearing en banc (with panel rehearing) filed by Appellant Marcelo Manrique. (ECF: Raymond Houlihan)
08/04/2015	☐	Added Attorney(s) Paul Michael Rashkind for party(s) Appellant Marcelo Manrique, in case 14-13029.
08/04/2015	☐	E-filed Appearance of Counsel processed for Attorney Paul Michael Rashkind for Appellant Marcelo Manrique in 14-13029.
09/11/2015	☐ 2 pg, 40.96 KB	ORDER: The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled, the Petition(s) for Rehearing En Banc filed by Appellant Marcelo Manrique are DENIED. [7571685-1]
09/21/2015	☐ 2 pg, 451.83 KB	Mandate issued as to Appellant Marcelo Manrique.

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RECORD AND BRIEFS

ORIGINAL

No. 15-7250

Supreme Court, U.S.
FILED
MAR - 4 2016
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

MARCELO MANRIQUE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
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QUESTION PRESENTED

Whether a notice of appeal from a sentencing judgment deferring restitution is effective to challenge the validity of a later-issued restitution award.

IN THE SUPREME COURT OF THE UNITED STATES

No. 15-7250

MARCELO MANRIQUE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is not published in the Federal Reporter but is available at 618 Fed. Appx. 579.

JURISDICTION

The judgment of the court of appeals was entered on July 15, 2015. A petition for rehearing was denied on September 11, 2015 (Pet. App. B1). The petition for a writ of certiorari was filed on December 2, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Florida, petitioner was convicted on one count of possessing a visual depiction of a minor engaging in sexually explicit conduct, in violation of 18 U.S.C. 2252(a)(4)(B) and (b)(2). The district court sentenced petitioner to 72 months of imprisonment and a life term of supervised release. It also ordered restitution in the amount of $4500. The court of appeals affirmed. Pet. App. A1-A4; Gov't C.A. Br. 1-2.

1. Petitioner was found in possession of child pornography on his computer, including a movie depicting an adult male anally penetrating a toddler, who appeared to be less than six years old. Gov't C.A. Br. 3. Pursuant to a plea agreement, petitioner pleaded guilty to one count of possessing a visual depiction of a minor engaging in sexually explicit conduct. See Id. at 1, 4.

At a sentencing hearing conducted on June 23, 2014, the district court imposed on petitioner a 72-month term of imprisonment and a life term of supervised release. It also ordered him to pay a special assessment of $100. Because the victims' losses had not yet been ascertained, the court scheduled a restitution hearing for the final determination of the victims' losses. Gov't C.A. Br. 1-2. The court's judgment

was entered on the docket the next day, June 24. The judgment memorialized the imprisonment, supervised release, and special assessment aspects of the sentence. It also stated that the determination of restitution was deferred and that an amended judgment would be entered after a determination of restitution. Id. at 2, 23. On July 8, petitioner filed a notice of appeal from the judgment that had been entered against him on June 24. Id. at 23.

On September 17, 2014, the district court conducted a restitution hearing. At the conclusion of the hearing, the court orally ordered petitioner to pay $4500 in restitution. The next day, September 18, the court entered an amended judgment, adding the order of restitution to the original judgment. Gov't C.A. Br. 24. Petitioner did not file a notice of appeal from the court's oral order or from the amended judgment. Ibid.

2. On appeal, petitioner challenged his life term of supervised release and the restitution order. As to the restitution order, the government argued that, under United States v. Muzio, 757 F.3d 1243, 1250 n.9 (11th Cir.), cert. denied, 135 S. Ct. 395 (2014), petitioner had waived his right to challenge the restitution order by failing to file a notice of appeal from the district court's oral ruling or from the

amended judgment. Gov't C.A. Br. 22-25.[1] The government also argued that the restitution order was correct. Id. at 26-32.

The court of appeals affirmed. Pet. App. A1-A4. As relevant here, it held that it "d[id] not have jurisdiction to entertain [petitioner's] challenge to his restitution amount because he did not file a notice of appeal designating the amended judgment setting forth the restitution amount." Id. at A4. The court noted that, in United States v. Kapelushnik, 306 F.3d 1090, 1093-1094 (11th Cir. 2002), it had previously held that an appeal from a sentencing judgment deferring restitution was premature and did not ripen until the district court either (1) ordered restitution or (2) lost the power to do so after 90 days. Following that decision, Dolan v. United States, 560 U.S. 605, 611 (2010), held that "[t]he fact that a sentencing court misses the [restitution] statute's 90-day deadline * * * does not deprive the court of the power to order restitution." The court of appeals explained that, in light of Dolan, it had been forced to reconsider the "Kapelushnik framework" to avoid the possibility that "an appeal [might] never ripen." Pet. App. A3. Accordingly, the court explained, in Muzio it had addressed that problem by establishing the following framework:

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[1] Petitioner incorrectly asserts that "the government posited no objection" to the court of appeals' consideration of his challenge to the restitution order. Pet. ii; see Pet. 23.

> [W]hen courts enter sentencing judgments ordering restitution but deferring determination of the amount, defendants have the option to either (a) timely appeal from the initial judgment and then, if desired, timely appeal from the subsequent judgment finalizing the amount of restitution, or (b) timely appeal from the subsequent judgment only, in which case all issues will be heard in a single appeal.

Ibid. Because petitioner did not follow either option, the court of appeals determined that it could not consider his challenge to the restitution order. Id. at A4.

The court of appeals rejected petitioner's argument that his premature notice of appeal had "ripened" following the entry of the amended judgment, explaining that "that argument relies on the Kapelushnik framework, which Muzio's framework replaced." Pet. App. A4. In order to challenge the restitution order, petitioner "was required to either appeal both the original judgment and the amended judgment, or appeal the amended judgment only," but he did not do either. Ibid. The court accordingly dismissed petitioner's challenge to the restitution order. Ibid.

ARGUMENT

Petitioner argues (Pet. 10-13, 18-24) that the court of appeals was wrong to hold that his failure to appeal from the amended judgment precluded his appellate challenge to the restitution order contained in that judgment. Petitioner also argues (Pet. 13-18) that the lower courts are divided on whether a notice of appeal from a sentencing judgment deferring restitution is effective to challenge the validity of a later-issued restitution award. The holding below is correct, and, although some disagreement exists among the courts of appeals, there is no square conflict. Further review is unwarranted.

1. a. In Dolan v. United States, 560 U.S. 605 (2010), this Court held that 18 U.S.C. 3664(d)(5), which gives a district court 90 days after sentencing in which to fix an amount of restitution, is not jurisdictional. 560 U.S. at 609-611. The petitioner had argued that allowing a district court to impose restitution beyond the 90-day deadline would prejudicially interfere with a defendant's ability to timely challenge his conviction and other portions of his sentence. The Court disagreed but acknowledged that "the interaction of restitution orders with appellate time limits could have consequences extending well beyond cases like the present case (where there was no appeal from the initial conviction and sentence)." Id. at 618. The Court therefore left "for another

day" the issue of "whether or when a party can, or must, appeal." Ibid. At the same time, the Court noted with approval the following procedure:

> [I]t is not surprising to find instances where a defendant has appealed from the entry of a judgment containing an initial sentence that includes a term of imprisonment; that same defendant has subsequently appealed from a later order setting forth the final amount of restitution; and the Court of Appeals has consolidated the two appeals and decided them together.

Ibid.

b. The court of appeals' adoption of the procedural framework described in Dolan is consistent with the Federal Rules of Appellate Procedure. Rule 4(b) governs the time for filing a notice of appeal in a criminal case. As relevant here, it provides:

> In a criminal case, a defendant's notice of appeal must be filed in the district court within 14 days after the later of:
> (i) the entry of either the judgment or the order being appealed; or
> (ii) the filing of the government's notice of appeal.

Fed. R. App. P. 4(b)(1)(A). Under that rule, when "the judgment or the order being appealed" is an order of restitution or a judgment that reflects such an order, the defendant must file a notice of appeal within 14 days after that order or judgment (or, if a notice of appeal is filed by the government, within 14 days of the government's notice). Where a sentencing court

enters an initial judgment that defers the issue of restitution, a notice of appeal from that initial judgment will not have the effect of appealing a later award of restitution. Rather, a notice of appeal must be filed following "the judgment or the order being appealed" -- that is, following the order of restitution itself or the amended judgment that incorporates the order of restitution. Ibid.

That conclusion is reinforced by Rule 4(b)(3)(C), which provides that, with respect to certain motions listed in Rule 4(b)(3)(A), "[a] valid notice of appeal is effective -- without amendment -- to appeal from an order disposing of any of the motions referred to in Rule 4(b)(3)(A)." The motions mentioned are a motion for a judgment of acquittal, certain motions for a new trial, and a motion for arrest of judgment. See Fed. R. App. P. 4(b)(3)(A). Rule 4(b) thus specifies that, for a limited category of motions, a notice of appeal is effective "without amendment" as a means of appealing from a later-issued order disposing of those motions. The clear implication is that similar latitude is not allowed for other types of orders, such as a post-judgment order setting the amount of restitution.

In the deferred-restitution scenario, therefore, a defendant who wishes to challenge restitution has two alternatives: He can wait to file a notice of appeal once the amended judgment has been issued; or, if he has already filed a

notice of appeal from the initial judgment, he can and must file an amended notice of appeal from the amended judgment. That procedure serves "[s]ystemic interests in the conservation of judicial resources," which "dictate that a party must not appeal an order simply because he believes it will be adverse." United States v. Cooper, 135 F.3d 960, 963 (5th Cir. 1998). Instead, a defendant who wishes to challenge an order of restitution should file a notice of appeal after the order has been finalized and entered, which will enable the defendant to evaluate the relevant legal rulings and their practical significance and make a considered decision -- before he files his appeal -- as to whether he has a basis for challenging the restitution ruling.

c. The decision below accords with those principles. The initial judgment entered by the sentencing court on June 24 did not contain an order of restitution; rather, the court orally ordered petitioner to pay restitution on September 17, and the court incorporated that order into an amended judgment on September 18. Under those circumstances, as the court of appeals explained, petitioner had two options for challenging the restitution order: "(a) timely appeal from the initial judgment and then * * * timely appeal from the subsequent judgment finalizing the amount of restitution, or (b) timely appeal from the subsequent judgment only." Pet. App. A3. Petitioner did neither, instead filing a notice of appeal solely

from the initial judgment. Petitioner's notice of appeal from the initial judgment was "premature" as a means of challenging the later-issued restitution order, and petitioner "did not file a notice of appeal designating the amended judgment setting forth the restitution amount." Id. at A4. Thus, the court correctly declined to review petitioner's appellate challenge to restitution. See ibid.

d. Petitioner acknowledges (Pet. 10) that his notice of appeal from the initial judgment was "[p]remature" as a means of challenging the later-issued restitution order, but he nevertheless argues that the notice of appeal "mature[d]" under Rule 4(b)(2). Rule 4(b)(2) creates a limited exception to the requirements set out in subsection (b)(1) by providing that a notice of appeal "filed after the court announces a decision, sentence, or order -- but before the entry of the judgment or order -- is treated as filed on the date of and after the entry." Fed. R. App. P. 4(b)(2). The limited exception in Rule 4(b)(2) does not help petitioner. It applies only to notices of appeal filed "after" the court announces a decision but before the formal "entry" on the docket of the order or judgment. Here, by contrast, petitioner filed a notice of appeal several months before both the order of restitution and the amended judgment. Allowing an appellate challenge to restitution under those circumstances would conflict with the requirement in Rule

4(b)(2) that the notice of appeal must be filed "after" the decision sought to be appealed. Ibid.

Contrary to petitioner's argument (Pet. 10-11), the decision below is also consistent United States v. Lemke, 346 U.S. 325 (1953), in which this Court interpreted former Fed. R. Crim. P. 37(a)(2), a predecessor to the current Fed. R. App. 4(b)(1)(A). There, the defendant had filed a notice of appeal after sentencing but before the formal entry of judgment, and the court of appeals "dismissed [his appeal] as premature." 346 U.S. at 326. The Court found the defendant's premature filing to be harmless error under Rule 52(a), emphasizing that the notice of appeal in that case was "still on file" when the judgment was issued and "gave full notice after that date, as well as before, of the sentence and judgment which petitioner challenged." Ibid. The Lemke decision was incorporated in Fed. R. App. P. 4(b)(2). See Pet. 11-12.

As explained above, the court of appeals' decision is consistent with Rule 4(b)(2), and therefore it accords with Lemke as well. In Lemke, the defendant filed his notice of appeal after his conviction and sentencing; only the ministerial task of entering the judgment remained. Here, by contrast, the notice of appeal at issue was filed several months before the restitution order sought to be challenged on appeal. The notice

of appeal was therefore ineffective as a means of challenging restitution.

2. Petitioner contends (Pet. 13-18) that the lower courts are divided 8-2 on whether a notice of appeal from a sentencing judgment deferring restitution is effective to challenge the validity of a later-issued restitution award, but he greatly overstates the extent of any disagreement.[2]

Most of the decisions cited by petitioner do not involve restitution at all. Three of the decisions stand only for the uncontroversial proposition that, "[p]ursuant to Rule 4(b)(2) of the Federal Rules of Appellate Procedure, a notice of appeal filed after the district court announces its decision, but prior to the entry of judgment, is deemed to be 'filed on the date of and after the entry.'" United States v. Bly, 510 F.3d 453, 457 n.6 (4th Cir. 2007); see United States v. Andrews, 681 F.3d 509, 516 n.2 (3d Cir. 2012); United States v. Cantero, 995 F.2d 1407, 1408 n.1 (7th Cir. 1993). As noted above, that proposition does not assist petitioner because he did not file his notice of appeal "after the district court announce[d] its decision" regarding restitution. Bly, 510 F.3d at 457 n.6. Three of the

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[2] Petitioner also asserts (Pet. 18-22) that the ruling by the court of appeals below is in tension with its own prior decisions. But even if such an intra-circuit conflict existed, it would not warrant this Court's review. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam).

other decisions cited by petitioner apply harmless-error reasoning to permit appeal under circumstances far different from this case. See United States v. Thornton, 1 F.3d 149, 157-158 (3d Cir. 1991) (permitting defendant to appeal denial of motion for new trial based on government's alleged failure to disclose Brady evidence), cert. denied, 510 U.S. 982 (1993); United States v. Walker, 915 F.2d 1463, 1465 (10th Cir. 1990) (permitting appellate challenge to conviction where defendant filed notice of appeal after conviction but before sentence); United States v. Winn, 948 F.2d 145, 155-156 (5th Cir. 1991) (permitting appeal of sentence where defendant filed notice of appeal before sentence, then filed "re-notice of appeal" after sentence was issued, and government "did not contest" the re-notice of appeal), cert. denied, 503 U.S. 976 (1992).

Of the remaining decisions cited by petitioner, only one squarely deals with the precise situation presented here, and, although it is unpublished, it supports the ruling below. In United States v. Castro, 554 Fed. Appx. 664, 667, cert. denied, 135 S. Ct. 305 (2014), the Ninth Circuit declined to hear the defendant's challenge to a restitution order because "his three notices of appeal of the district court's restitution award were all filed months before the district court had even held a restitution hearing." Because the government had objected to

appellate review of that issue, the court held, "dismissal [of the appeal] is mandatory." Ibid.

The remaining cases cited by petitioner, only one of which is published, are distinguishable. In United States v. Cheal, 389 F.3d 35, 53 (2004), the First Circuit held that the defendant's notice of appeal from the judgment of conviction in that case "served to bring" a later restitution order "before [the court] for appellate consideration." The court also stated, however, that the defendant "should have filed a second notice of appeal" from the amended judgment incorporating the restitution order and that, "looking to the future, we think that, as a general proposition, a deferred restitution order * * * subsequent to a final judgment of conviction which has already been appealed, should be the subject of a second notice of appeal." Id. at 52 (footnote omitted). Accordingly, criminal defendants in the First Circuit will likely have to follow substantially the same procedures as those established by the Eleventh Circuit in Muzio and followed here.

Petitioner also cites two unpublished cases from the Sixth Circuit, but neither squarely conflicts with the decision below. In United States v. Malcolm, No. 95-1087, 1997 WL 311416 (6th Cir. Jun. 11, 1997) (114 F.3d 1190) (table), the court of appeals held that the district court had "blundered" when it entered an initial judgment despite deferring the issue of

restitution. Id. at *5. The Sixth Circuit concluded that the district court "did not enter a final judgment until" it entered an amended judgment that incorporated an order of restitution. Ibid. The court nevertheless permitted the defendant to challenge the restitution order based on his earlier-filed notice of appeal, which the defendant had filed after the initial judgment, noting that the government had not objected to the court's consideration of that issue. Id. at *7. The court acknowledged "the unusual procedural posture of th[e] case," ibid., which appears to reflect the court's view that judgments deferring restitution (as in this case) are not proper. And in United States v. Stoian, No. 15-5173, 2015 WL 5036366 (6th Cir. Aug. 12, 2015), the court of appeals stated that the defendants' notices of appeal from original judgments would "'spring forward' and confer jurisdiction" over later-filed amended judgments that incorporated restitution orders. Id. at *1. But in that case, "the defendants also appealed their amended judgments," ibid., and the court dismissed as duplicative the earlier appeals and instead "proceed[ed]" on "[t]he defendants' appeals from their amended judgments," id. at *2. Stoian thus is not case in which a notice of appeal from an original judgment of conviction deferring restitution provided the basis for the exercise of appellate review over a later-filed restitution order.

The Second Circuit's unpublished decision in United States v. Hyde, 556 Fed. Appx. 62 (2014), is also distinguishable. There, the defendant filed a timely notice of appeal after the district court entered its original judgment. Id. at 63 n.1. After the court filed an amended judgment incorporating a restitution order, the defendant did not file a new notice of appeal from the amended judgment, ibid., but neither did the defendant challenge his restitution on appeal. Instead, the defendant appealed "only with respect to [a] special condition of supervised release," which had been contained in the original judgment. Id. at 63. Therefore, although the court stated that the defendant's notice of appeal from the original judgment "ripened into an effective notice of appeal from the amended judgment as well," id. at 63 n.1 (citation and internal quotation marks omitted), that statement was not necessary to its decision to consider the defendant's challenge to the condition of his supervised release. The decision below by the Eleventh Circuit would similarly have permitted appellate consideration of the defendant's challenge to supervised release under the circumstances presented in Hyde.

Finally, petitioner contends (Pet. 17) that the ruling below is at odds with decisions from other Circuits because the court of appeals in this case stated that it "d[id] not have jurisdiction" (Pet. App. A4) to entertain petitioner's appeal of

the restitution order, whereas the First, Second, Sixth, and Ninth Circuits "recognize their jurisdiction" (Pet. 17) over such an appeal. That distinction, however, does not independently warrant the Court's review. When a court of appeals declines to review a defendant's challenge to restitution because the defendant filed his notice of appeal before the restitution order, the practical result is the same regardless whether the court of appeals describes its ruling as "jurisdiction[al]," Pet. App. A4, or merely "mandatory," Castro, 554 Fed. Appx. at 667.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

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SANGITA K. RAO
Attorney

MARCH 2016

No. 15-7250

IN THE SUPREME COURT OF THE UNITED STATES

MARCELO MANRIQUE, PETITIONER

v.

UNITED STATES OF AMERICA

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served with copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION**, via email and by first-class mail, postage prepaid, this 4th day of March, 2016.

[See Attached Service List]

Donald B. Verrilli, Jr. KRB

Donald B. Verrilli, Jr.
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March 4, 2016

Due to the continuing delay in receiving incoming mail at the Department of Justice, in addition to mailing your brief via first-class mail, we would appreciate a fax or email copy of your brief. If that is acceptable to you, please fax your brief to Charlene Goodwin, Supervisor, Case Management Specialist, Office of the Solicitor General, at (202) 514-8844, or email at SupremeCtBriefs@USDOJ.gov. Ms. Goodwin's phone number is (202) 514-2217 or 2218. Thank you for your consideration of this request.

15-7250
MANRIQUE, MARCELO
USA

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Supreme Court, U.S.
FILED
JUL - 8 2016
OFFICE OF THE CLERK

No. 15-7250

In The Supreme Court of the United States

MARCELO MANRIQUE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

JOINT APPENDIX

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Certiorari Granted April 25, 2016

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U.S. District Court
Southern District of Florida (Miami)
CRIMINAL DOCKET FOR
CASE #: 1:14-cr-20064-JEM All Defendants

Case title: USA v. Manrique
Magistrate judge case number: 1:14-mj-02030-PAW

Date Filed: 01/31/2014
Date Terminated: 06/24/2014

Assigned to: Judge Jose E. Martinez

Appeal court case number: 14-13029-B

Defendant (1)

Marcelo Manrique
02081-104
YOB: 1989; ENGLISH
TERMINATED. 06/24/2014

Pending Counts	**Disposition**
18:2252.F POSSESSION OF CHILD PORNOGRAPHY (1)	AMENDED: IMPRISONMENT:72 months; SUPERVISED RELEASE: Term of life; ASSESSMENT: $100.00; RESTITUTION: $4,500.00. PRIOR JUDGMENT: IMPRISONMENT:72 months; SUPERVISED RELEASE: term of life; ASSESSMENT: $100.00. Surrender: 6/23/14 at 3:15PM

Highest Offense Level (Opening)

Felony

Terminated Counts **Disposition**

None

Highest Offense Level (Terminated)

None

Complaints **Disposition**

18:2252A.F; ACTIVITIES RE: MATERIAL CONSTITUTING/ CONTAINING CHILD PORNOGRAPHY

Plaintiff

USA

Date Filed	#	Docket Text
01/10/2014	1	COMPLAINT as to Marcelo Manrique (1). (aw) [1:14-mj-02030-PAW] (Entered: 01/13/2014)
01/10/2014		Arrest of Marcelo Manrique (cg1) [1:14-mj-02030-PAW] (Entered: 01/14/2014)
01/31/2014	15	INFORMATION as to Marcelo Manrique (1) count(s) 1. CRIMINAL FORFEITURE. (nf) (Entered: 01/31/2014)
02/03/2014	17	WAIVER OF INDICTMENT by Marcelo Manrique (cg1) (Entered: 02/03/2014)

04/03/2014	28	Minute Entry: for proceedings held before Judge Jose E. Martinez: Change of Plea Hearing as to Marcelo Manrique held on 4/3/2014 Marcelo Manrique (1) Guilty Count 1. * * * (Entered: 04/03/2014)
04/03/2014	29	FACTUAL PROFFER: Exhibit #1 as to Marcelo Manrique (wh) (Entered: 04/03/2014)
04/03/2014	30	PLEA AGREEMENT: Exhibit #2 as to Marcelo Manrique (wh) (Entered: 04/03/2014)
05/01/2014	37	DRAFT Disclosure of Presentence Investigation Report of Marcelo Manrique. This is a limited access document. Report access provided to attorneys Brooke C. Watson, Raymond D'Arsey Houlihan, III by USPO (Attachments: # 1 Position of Parties) (kme) (Entered: 05/01/2014)
06/05/2014	42	FINAL Addendum 1 Disclosure of Presentence Investigation Report of Marcelo Manrique. This is a limited access document. Report access provided to attorneys Brooke C. Watson, Raymond D'Arsey Houlihan, III by USPO (Attachments: # 1 Addendum) (kme) (Entered: 06/05/2014)
06/24/2014	52	Minute Order for proceedings held before Judge Jose E. Martinez: granting 49 Sealed Motion as to Marcelo Manrique (1); denying 50 Motion to Continue Sentencing as to

		Marcelo Manrique (1); Sentencing held on 6/23/2014 as to Marcelo Manrique. * * * (Entered: 06/24/2014)
06/24/2014	53	JUDGMENT as to Marcelo Manrique (1), Count(s) 1, IMPRISONMENT:72 months; SUPERVISED RELEASE: term of life; ASSESSMENT: $100.00. Surrender: 6/23/14 at 3:15PM Signed by Judge Jose E. Martinez on 6/23/2014. (cbr) (Entered: 06/24/2014)
06/26/2014	54	PAPERLESS ORDER SETTING Restitution Hearing as to Marcelo Manrique re 53 Judgment. Restitution hearing set for 8/22/2014 01:30 PM in Miami Division before Judge Jose E. Martinez. Signed by Judge Jose E. Martinez on 6/26/2014. (wh) (Entered: 06/26/2014)
07/08/2014	55	NOTICE OF APPEAL by Marcelo Manrique Re: 53 Judgment. Filing fee $505.00.. USA/FPD Filer – No Filing Fee Required. Within fourteen days of the filing date of a Notice of Appeal, the appellant must complete the Eleventh Circuit Transcript Order Form regardless of whether transcripts are being ordered [Pursuant to FRAP 10(b)]. For information go to our FLSD website under Transcript Information. (Houlihan, Raymond) (Entered: 07/08/2014)
07/08/2014		Transmission of Notice of Appeal and Docket Sheet as to Marcelo

		Manrique to US Court of Appeals re 55 Notice of Appeal – Final Judgment, Notice has been electronically mailed. (hh) (Entered: 07/08/2014)
07/09/2014	56	Acknowledgment of Receipt of NOA from USCA as to Marcelo Manrique re 55 Notice of Appeal – Final Judgment, date received by USCA: 7/8/14. USCA Case Number: 14-13029-B. (hh) (Entered: 07/09/2014)
07/18/2014	58	TRANSCRIPT INFORMATION FORM as to Marcelo Manrique re 55 Notice of Appeal – Final Judgment, filed by Marcelo Manrique. Plea and Sentencing transcript(s) ordered. Order placed by R. D'Arsey Houlihan. Email sent to Court Reporter Coordinator. (Houlihan, Raymond) (Entered: 07/18/2014)
08/12/2014	60	TRANSCRIPT of change of plea as to Marcelo Manrique held on 4-3-2014 before Judge Jose E. Martinez, 1-24 pages, re: 55 Notice of Appeal – Final Judgment, * * * (Entered: 08/12/2014)
08/12/2014	61	TRANSCRIPT of sentencing hearing as to Marcelo Manrique held on 6-23-2014 before Judge Jose E. Martinez, 1-41 pages, re: 55 Notice of Appeal – Final Judgment, * * * (Entered: 08/12/2014)
08/19/2014	62	NOTICE RESET HEARING as to Marcelo Manrique. Restitution Hearing reset for 9/17/2014 01:30 PM in

Miami Division before Judge Jose E. Martinez. (wh) (Entered: 08/19/2014)

09/15/2014 65 PAPERLESS/NOTICE OF HEARING (TIME ONLY) as to Marcelo Manrique. Restitution Hearing set for 9/17/2014 now at 2:30 PM in Miami Division before Judge Jose E. Martinez. (wh) (Entered: 09/15/2014)

09/17/2014 66 Minute Entry for proceedings held before Judge Jose E. Martinez: Restitution Hearing held on 9/17/2014 as to Marcelo Manrique. * * * (Entered: 09/17/2014)

09/18/2014 67 AMENDED JUDGMENT as to Marcelo Manrique (1), Count(s) 1, AMENDED: IMPRISONMENT:72 months; SUPERVISED RELEASE: term of life; ASSESSMENT: $100.00; RESTITUTION: $4,500.00. PRIOR JUDGMENT: IMPRISONMENT:72 months; SUPERVISED RELEASE: term of life; ASSESSMENT: $100.00. Surrender: 6/23/14 at 3:15PM Signed by Judge Jose E. Martinez on 9/18/2014. (cbr) (Entered: 09/18/2014)

09/19/2014 68 TRANSCRIPT INFORMATION FORM as to Marcelo Manrique re 55 Notice of Appeal – Final Judgment, filed by Marcelo Manrique. Restitution transcript(s) ordered. Order placed by R. D'Arsey Houlihan. Email sent to Court Reporter Coordinator. (Houlihan, Raymond) (Entered: 09/19/2014)

11/04/2014	70	TRANSCRIPT of restitution hearing as to Marcelo Manrique held on 9-17-2014 before Judge Jose E. Martinez, 1-19 pages, re: 55 Notice of Appeal – Final Judgment, * * * (Entered: 11/04/2014)
11/04/2014	71	TRANSCRIPT of restitution hearing as to Marcelo Manrique held on 9-17-2014 before Judge Jose E. Martinez, 1-19 pages, re: 55 Notice of Appeal – Final Judgment, * * * (Entered: 11/04/2014)
01/27/2015	76	Pursuant to F.R.A.P. 11(c), the Clerk of the District Court for the Southern District of Florida certifies that the record is complete for purposes of this appeal re: 55 Notice of Appeal – Final Judgment, Appeal No. 14-13029-BB. The entire record on appeal is available electronically. (hh) (Entered: 01/27/2015)
09/21/2015	77	MANDATE of USCA, AFFIRMED IN PART, DISMISSED IN PART. We affirm Manrique's sentence as set forth in the district court's original judgment, and dismiss his challenge to the restitution amount reflected in his amended judgment for lack of jurisdiction as to Marcelo Manrique re 55 Notice of Appeal – Final Judgment, ; Date Issued: 9/21/15 ; USCA Case Number: 14-13029-BB (hh) (Entered: 09/22/2015)

General Docket
United States Court of Appeals
for the Eleventh Circuit

Court of Appeals Docket #:
14-13029 **Docketed**: 07/08/2014
USA v. Marcelo Manrique **Termed**: 07/15/2015
Appeal From: Southern District of Florida
Fee Status: IFP Granted

Case Type Information:
1) Criminal
2) Direct Criminal
3) –

Originating Court Information:
District: 113C-1 : 1:14-cr-20064-JEM-1
Court Reporter: Dawn Whitmarsh
Sentencing Judge: Jose E. Martinez,
U.S. District Judge
Date Filed: 01/31/2014
Date NOA Filed:
07/08/2014

Prior Cases:
None

Current Cases:
None

UNITED STATES OF AMERICA

Plaintiff-Appellee

versus

MARCELO MANRIQUE

Defendant-Appellant

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MARCELO MANRIQUE,

Defendant-Appellant.

07/08/2014 CRIMINAL APPEAL DOCKETED. Notice of appeal filed by Appellant Marcelo Manrique on 07/08/2014, Fee Status: IFP Granted.

07/18/2014 TRANSCRIPT INFORMATION FORM SUBMITTED by Attorney Raymond D'Arsey Houlihan, III for Appellant Marcelo Manrique. Transcript(s) ordered, (ECF: Raymond Houlihan)

08/20/2014 TRANSCRIPTS FILED: Transcript Order: Court Reporter: Dawn Whitmarsh, Filer: Marcelo Manrique, Dt. all Trans. Filed: 08/12/2014, Proceeding Type and Date: Sentencing 06/24/2014, Plea Hearing 04/03/2014.

09/19/2014	TRANSCRIPT INFORMATION FORM SUBMITTED by Attorney Raymond D'Arsey Houlihan, III for Appellant Marcelo Manrique. Transcript(s) ordered. (ECF: Raymond Houlihan)
09/23/2014	USDC Restitution Order as to Appellant Marcelo Manrique was filed on 09/18/2014. Docket Entry 67.
11/14/2014	TRANSCRIPTS FILED. Transcript Order: Court Reporter: Dawn Whitmarsh, Filer: Marcelo Manrique, Dt. all Trans. Filed: 11/04/2014, Proceeding Type and Date: Other Hearings 09/17/2014.
11/14/2014	Briefing Notice issued to Appellant Marcelo Manrique. The appellants brief is due on or before 12/15/2014. The appendix is due no later than 7 days from the filing of the appellant's brief.
12/22/2014	Appellant's brief filed by Marcelo Manrique. (ECF: Raymond Houlihan)
12/22/2014	Appendix filed [1 VOLUMES) by Appellant Marcelo Manrique. (ECF: Raymond Houlihan)
12/30/2014	Appellee's Brief filed by Appellee USA. (ECF: Phillip DiRosa)
02/09/2015	Reply Brief filed by Appellant Marcelo Manrique. (ECF: Raymond Houlihan)
07/15/2015	Opinion issued by court as to Appellant Marcelo Manrique. Decision: Affirmed in part and Dismissed in part. Opinion

	type: Non-Published. Opinion method: Per Curiam.
08/04/2015	Petition for rehearing en banc (with panel rehearing) filed by Appellant Marcelo Manrique. (ECF: Raymond Houlihan)
09/11/2015	ORDER: The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled, the Petition(s) for Rehearing En Banc filed by Appellant Marcelo Manrique are DENIED. [7571685-1)
09/21/2015	Mandate issued as to Appellant Marcelo Manrique.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 14-20064-CR-MARTINEZ/GARBER
18 U.S.C. § 2252(a)(4)(B) & (b)(2)
18 U.S.C. § 2253

UNITED STATES OF AMERICA

vs.

MARCELO MANRIQUE,

Defendant. /

INFORMATION

(Filed Jan. 31, 2014)

The United States Attorney charges that:

On or about January 10, 2014, in Miami-Dade County, in the Southern District of Florida, the defendant,

MARCELO MANRIQUE,

did knowingly possess matter, that is, a generic desktop computer, which contained any visual depiction that had been shipped and transported using any means and facility of interstate and foreign commerce, and in and affecting interstate and foreign commerce, and which was produced using materials which have been so shipped and transported, by any means, including by computer, and the production of such visual depiction having involved the use of a minor engaged

in sexually explicit conduct, as defined in Title 18, United States Code, Section 2256(2), and such visual depiction was of such conduct, in violation of Title 18, United States Code, Section 2252(a)(4)(B) and (b)(2).

Pursuant to Title 18, United States Code, Section 2252(b)(2), it is further alleged that such visual depiction involved a prepubescent minor or a minor who had not attained twelve years of age.

CRIMINAL FORFEITURE

1. The allegations of this Indictment are realleged and by this reference fully incorporated herein for the purpose of alleging forfeiture to the United States of America of certain property in which the defendant, **MARCELO MANRIQUE**, has an interest.

2. Upon conviction of a violation of Title 18, United States Code, Section 2252, as alleged in this Indictment, the following property will be forfeited to the United States pursuant to Title 18, United States Code, Section 2253:

(a) any visual depiction of a minor engaged in sexually explicit conduct, and any book, magazine, periodical, film, videotape, or other matter which contains any such visual depiction, which was produced, transported, mailed, shipped or received in violation of Chapter 110, Title 18, United States Code;

(b) any property, real or personal, constituting or traceable to gross profits or other proceeds which the defendant obtained from such violation; and

(c) any property, real or personal, used or intended to be used to commit or to promote the commission of such violation and any property traceable to such property.

3. The property which is subject to forfeiture includes, but is not limited to, the following:

(a) A generic desktop computer;

(b) A Seagate Barracuda 7200.7 160 Gbytes hard drive;

(c) A Seagate "Barracuda" 3000 GB hard drive;

(d) A Western Digital 1.0TB hard drive;

(e) A Maxxtor hard drive;

(f) A Western Digital WD200 20.0 GB hard drive; and

(g) A FUJITSU hard drive model M2684TAU.

All pursuant to Title 18, United States Code, Section 2253, and the procedures set forth at Title 21, United States Code, Section 853, as made applicable by Title 18, United States Code, Section 2253(b).

/s/ [Illegible]
WIFREDO A. FERRER
UNITED STATES ATTORNEY

/s/ BW
BROOKE C. WATSON
ASSISTANT UNITED STATES
ATTORNEY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 14-CR-20064-MARTINEZ

UNITED STATES OF AMERICA

v.

MARCELO MANRIQUE,

Defendant.

FACTUAL PROFFER

(Redacted)

(Filed Apr. 3, 2014)

If this matter were to proceed to trial, the Government would prove the stated facts beyond a reasonable doubt.

Based on an on-going investigation involving IP addresses associated with the suspected possession of child pornography, agents from the Department of Homeland Security ("HSI") conducted a "knock-and-talk" at [redacted] Miami, Florida 33196 on January 10, 2014. Agents were granted entry into the home by the legal residents of that home. Once inside, agents spoke to the residents of [redacted] including the defendant, Marcelo MANRIQUE. Agents explained that they were looking for evidence of contraband that may be located on computers within the home. The residents of [redacted]gave consent for Computer Forensic

Agents (CFA) to search their computers and electronic devices.

Agents then began to conduct interviews of the residents of [redacted] while the CFA conducted forensic previews of the computers and electronic devices on scene. When agents spoke to MANRIQUE, he indicated that the generic black desktop computer located in his bedroom belonged to him. He stated his profile on the desktop was password protected and that he did not share his password with anyone. MANRIQUE was given his *Miranda* warnings and waived them orally and in writing. During post *Miranda* statements, MANRIQUE admitted to downloading child pornography, which he knew was illegal, and stated he has been downloading child pornography for approximately 11 years. He claimed he believed he had 200 child pornography files saved on his desktop computer.

MANRIQUE gave oral and written consent to search his black generic desktop computer and provided agents with his password. The HSI CFA recovered over 300 files depicting child pornography from his generic desktop computer. The agents explained to MANRIQUE what was discovered and he acknowledged that he had downloaded the files. Some of the files recovered during the preview were:

a. **(~pthc Center~) (opva)(2012) HDV_0151 (5yo Sam nice bj)-** This was a movie file which, in part, depicts a minor female who appears to be under the age of 12, performing oral sex on an adult male. The adult male then ejaculates in her mouth.

b. **(HussyFan)(Pthc)(R@Ygold)(Babyshivid) Kitty1 [Blowjob cumshot inside mouth pedo illegal underage]-** This movie file, in part, depicts a minor female who appears to be under the age of 6, performing oral sex on an adult male. The adult male later ejaculates on the minor female.

c. **2010 pthc frifam fucking 4yo ass-** This movie file, in part, depicts an adult male anally penetrating a toddler with his penis. The toddler appeared to be under the age of 6.

The visual depictions of child pornography on MANRIQUE' s computer were each transported via the internet to the defendant's computer. Thus, each visual depiction of child pornography on the defendant's computer had been transported in interstate or foreign commerce. Furthermore, the images of child pornography were stored on the defendant's computer, the components of which (including the hard drives), were manufactured outside of the state of Florida, Thus, the government would prove that the defendant's computer is an instrumentality of interstate and foreign commerce.

WIFREDO A. FERRER
UNITED STATES ATTORNEY

Date: 4/3/14 By: /s/ [Illegible] BW
Brooke C. Watson
ASSISTANT UNITED
STATES ATTORNEY

Date: 4/3/14 By: /s/ RDH
D'Arsey Houlihan
ATTORNEY FOR
DEFENDANT

Date: 4/3/14 By: /s/ M Manrique
Marcelo Manrique
DEFENDANT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
CASE NO. 14-20064-CR-JEM

UNITED STATES OF AMERICA,

Plaintiff,

vs.

Miami, Florida
April 3, 2014

MARCELO MANRIQUE,

Defendant.

TRANSCRIPT OF
CHANGE OF PLEA HEARING
BEFORE THE HONORABLE JOSE E. MARTINEZ
UNITED STATES DISTRICT JUDGE

(EXCERPT)

APPEARANCES:

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FOR THE DEFENDANT:

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Miami, Florida 33130

REPORTED BY:
DAWN M. WHITMARSH, RPR
Official Court Reporter
400 N. Miami Avenue, 10S03
Miami, Florida 33128
Telephone: 305-523-5598

* * *

[10] the visual depiction involved a prepubescent minor who had not attained the age of 12.

THE COURT: All right, sir. You heard what the government said. Do you understand that's what you're pleading guilty to?

THE DEFENDANT: Yes.

THE COURT: Now, is there – there is a forfeiture count. What are we talking about forfeiting?

MS. WATSON: The computer that was seized in this case that contained the child pornography.

THE COURT: Okay. You understand that they're also seeking to forfeit the computer that was used in this transaction. Do you understand that?

THE DEFENDANT: Yes. There's no way I can get the computer back without the hard drives?

THE COURT: No, apparently not. They want the entire computer because it was used in a crime.

THE DEFENDANT: Understood.

THE COURT: Would the government make a representation concerning the facts you would be prepared to prove at trial.

MS. WATSON: If this matter were to proceed to trial, the government would prove the following:

There was an ongoing investigation into a certain IP address that agents from the Department of Homeland Security believed was involved in the possession of child pornography.

[11] Agents conducted a knock and talk at [redacted] in Miami, Florida on January 10, 2014. Agents were allowed entry into the home by the legal residents of the home.

Once inside, they spoke to the individuals inside the home including Mr. Manrique, the defendant. Agents explained they were looking for evidence and contraband that may be located within the home and the residents of that home gave the computer forensic agents permission to search the computers and electronic devices within that home.

Agents conducted interviews of the residents of [redacted] while the computers were forensically analyzed. When agents spoke to Mr. Manrique, he indicated that the black generic desktop computer located in his bedroom belonged to him. He stated the profile on the computer was password protected and didn't share his password with anyone. Mr. Manrique was

given his *Miranda* warnings and waived them orally and in writing.

During post-*Miranda* statements, Mr. Manrique admitted to downloading child pornography, which he knew was illegal, and stated he's been downloading child pornography for approximately 11 years. He claimed he believed he had 200 pictures saved on his computer.

Mr. Manrique gave oral and written consent to search his black generic desktop computer, and agents recovered over [12] 300 files depicting child pornography from that computer.

Agents explained to Mr. Manrique what was discovered. He acknowledged that the downloaded files were his and that he in fact downloaded them.

Some of the files included minor females who appeared to be under the age of 12 performing oral sex on an adult male; a minor female who appeared to be under the age of six performing oral sex on an adult male, and an adult male anally penetrating a toddler with his penis.

The visual depictions of child pornography on Mr. Manrique's computer were each transferred via the internet to the defendant's computer. Thus, each visual depiction of child pornography on the defendant's computer had been transported in interstate or foreign commerce.

Furthermore, the images of child pornography were stored on the defendant's computer, the components of which, including the hard drives, were manufactured outside of the state of Florida. Thus, the government would prove that the defendant's computer is an instrumentality of interstate and foreign commerce.

THE COURT: All right, sir. You heard what the government said. Do you believe if this case were to go to trial, they could prove what they said?

THE DEFENDANT: I'm sorry. Can you repeat that?

THE COURT: Yes. You heard what the government said [13] they could prove if this case were to go to trial. Do you believe if this case were to go to trial, they could prove what they just said?

THE DEFENDANT: Yes.

THE COURT: Is it true?

THE DEFENDANT: Yes.

THE COURT: All right. I have here a document that says it's a factual proffer. It's three pages – yes, sir. I'm sorry. Go ahead.

THE DEFENDANT: Well, one thing that I would like to clarify is that when they – when I said since I was 13, I actually meant that was the first time I had seen it. And I had not started downloading it until many years later.

THE COURT: Okay. so that part of the factual proffer, you don't believe that they could prove – that you don't believe that you said that they – you had been downloading this for 11 years. what you said – what you believe you said was that you first saw this 11 years ago, and began downloading it a little bit later than that? Is that what you're saying?

MR. HOULIHAN: Judge, I think what he's saying is that he believes he may have said that, but he was mistaken when he said he downloaded it at 13. He actually saw it at 13, downloaded it and –

THE COURT: Sometime later.

MR. HOULIHAN: Yes, Judge.

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
CASE NO. 14-20064-CR-JEM

UNITED STATES OF AMERICA,

Plaintiff,

vs.

Miami, Florida
June 23, 2014

MARCELO MANRIQUE,

Defendant.

TRANSCRIPT OF
SENTENCING HEARING
BEFORE THE HONORABLE JOSE E. MARTINEZ
UNITED STATES DISTRICT JUDGE

(EXCERPT)

APPEARANCES:

FOR THE PLAINTIFF:

United States Attorney's Office
BY: ROBERT EMERY, A.U.S.A.
99 N.E. 4th Street
Miami, Florida 33132

FOR THE DEFENDANT:

Federal Public Defender's Office
BY: RAYMOND D'ARSEY HOULIHAN, A.F.P.D.
150 West Flagler Street
Miami, Florida 33130

REPORTED BY:
DAWN M. WHITMARSH, RPR
Official Court Reporter
400 N. Miami Avenue, 10S03
Miami, Florida 33128
Telephone: 305-523-5598

* * *

[38] THE COURT: The court has considered the statements of all the parties, the presentence report which contains the advisory guidelines and the statutory factors as set forth in 18 USC section 3553(a).

It is the finding of the court that the defendant is not able to pay a fine; however, restitution is mandatory.

It is the judgment of the court that the defendant, Marcelo Manrique, is to be committed to the Bureau of Prisons to be imprisoned for 72 months. I have done a downward variance because I do not believe the defendant is a danger for recidivism, I think that 72 months is sufficient but not excessive to prevent, to deter. I think under all of the guidelines under section 3553(a), that is a fair sentence.

It is further ordered that pursuant to 18 USC Section 3664(d)(5), the victims' losses are not yet ascertainable; therefore, the court will set a date of Friday August 22, 2014 at 1:30 p.m. for the final determination of the victims' losses.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of life. Within 72 hours of release, the defendant shall report in person to the probation office in the district where released. While on supervised release, the defendant shall not commit any crimes, shall be prohibited from possessing a firearm or other dangerous device, shall not possess a controlled substance, shall cooperate in the collection of DNA and shall comply with the [39] standard conditions of supervised release including the following special conditions:

Computer possession restriction, employer computer restriction disclosure, mental health treatment, self-employment restriction, no contact with minors, no contact with minors in employment, no involvement in youth organizations, sex offender treatment, restricted from possession of sexual materials, Adam Walsh Act search condition and sex offender registration as noted in part G of the presentence report.

The defendant shall immediately pay to the United States a special assessment of $100.

The total sentence: 72 months imprisonment, life supervised release, $100 special assessment.

The defendant's right, title and interest in the property identified in the preliminary order of forfeiture which has been entered by the court and is incorporated by reference herein is hereby forfeited.

Now that sentence has been imposed, does the defendant or his counsel object to the court's finding of fact or the manner in which sentence was pronounced?

MR. HOULIHAN: Judge, we object to the supervised release condition just based on the argument that I had made.

THE COURT: All right. Are there additional counts to be dismissed?

MR. EMERY: No, I don't believe, Your Honor. He's a [40] one count information.

THE COURT: All right. You have the right to appeal the sentence imposed. Any notice of appeal must be filed within 14 days after the entry of the judgment. If you're unable to pay the cost of an appeal, you may apply for leave to appeal in forma pauperis.

I will put in my formal order that the defendant should be – I will recommend that the defendant be incarcerated as close to South Florida as is possible, commensurate with his background and the offense of which he stands convicted.

MR. HOULIHAN: Judge, in terms of surrender?

THE COURT: Yes.

MR. HOULIHAN: Can we get a surrender date?

THE COURT: I was going to remand him.

MR. HOULIHAN: In that case, Your Honor, what I'd ask is it possible that he self surrender right now and just walk downstairs and surrender himself to the marshals?

THE COURT: Yes, he can do that. How are we getting him there? well, if he doesn't show up, I can stop him before he leaves the building. so yes.

MR. HOULIHAN: We can have a court officer walk down with us.

THE COURT: Can he go to the lockup? There's not a lockup in this building, is there? It's across the street.

COURT SECURITY OFFICER: In 301 building.

* * *

UNITED STATES DISTRICT COURT
Southern District of Florida
Miami Division

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE**
v.	(Filed Jun. 24, 2014)
MARCELO MANRIQUE	Case Number: **14-20064-CR-MARTINEZ** USM Number: **02081-104** Counsel For Defendant: **Raymond D'Arsey Houlihan** Counsel For The United States: **Brooke Watson** Court Reporter: **Dawn Whitmarsh**

The defendant pleaded guilty to count(s) 1 of the Information.

The defendant is adjudicated guilty of these offenses:

TITLE & SECTION	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18 U.S.C.§ 2252(a)(4)(B)	possession of material involving the sexual exploitation of minors	01/10/2014	1

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material changes in economic circumstances.

Date of Imposition of Sentence:
6/23/2014

/s/ Jose E. Martinez
Jose E. Martinez
United States District Judge

Date: 24 June 2014

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **72 months** as to Count One of the Information.

The court makes the following recommendations to the Bureau of Prisons: The defendant shall be assigned to a facility as close to South Florida as possible commensurate with his background and the offence of which he stands convicted.

The defendant shall surrender to the US Marshal for this District on or before June 23, 2014 at 3:15 pm.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____
at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

_____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **life** as to Count One.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The

defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;

2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first fifteen days of each month;

3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4. The defendant shall support his or her dependents and meet other family responsibilities;

5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6. The defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere

and shall permit confiscation of any contraband observed in plain view of the probation officer;

11. The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

Adam Walsh Act Search Condition – The defendant shall submit to the U.S. Probation Officer conducting periodic unannounced searches of the defendant's person, property, house, residence, vehicles, papers, computer(s), other electronic communication or data storage devices or media, include retrieval and copying of all data from the computer(s) and any internal or external peripherals and effects at any time, with or without warrant by any law enforcement or probation officer with reasonable suspicion concerning unlawful conduct or a violation of a condition of probation or supervised release. The search may include the retrieval and copying of all data from the computer(s) and any

internal or external peripherals to ensure compliance with other supervision conditions and/or removal of such equipment for the purpose of conducting a more thorough inspection; and to have installed on the defendant's computer(s), at the defendant's expense, any hardware or software systems to monitor the defendant's computer use.

Computer Possession Restriction – The defendant shall not possess or use any computer; except that the defendant may, with the prior approval of the Court, use a computer in connection with authorized employment.

Employer Computer Restriction Disclosure – The defendant shall permit third party disclosure to any employer or potential employer, concerning any computer-related restrictions that are imposed upon the defendant.

Mental Health Treatment – The defendant shall participate in an approved inpatient/outpatient mental health treatment program. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

No Contact with Minors – The defendant shall have no personal, mail, telephone, or computer contact with children/minors under the age of 18 or with the victims.

No Contact with Minors in Employment – The defendant shall not be employed in a job requiring contact with children under the age of 18 or with the victims.

No Involvement in Youth Organizations – The defendant shall not be involved in any children's or youth organization.

Restricted from Possession of Sexual Materials – The defendant shall not buy, sell, exchange, possess, trade, or produce visual depictions of minors or adults engaged in sexually explicit conduct. The defendant shall not correspond or communicate in person, by mail, telephone, or computer, with individuals or companies offering to buy, sell, trade, exchange, or produce visual depictions of minors or adults engaged in sexually explicit conduct.

Self-Employment Restriction – The defendant shall obtain prior written approval from the Court before entering into any self-employment.

Sex Offender Registration – The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense.

Sex Offender Treatment – The defendant shall participate in a sex offender treatment program to include psychological testing and polygraph examination.

Participation may include inpatient/outpatient treatment, if deemed necessary by the treatment provider. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$100.00	$0.00	$0.00

The determination of restitution is deferred until 8/22/2014. An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

NAME OF PAYEE	TOTAL LOSS*	RESTITUTION ORDERED	PRIORITY OR PERCENTAGE

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

**Assessment due immediately unless otherwise ordered by the Court.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A. Lump sum payment of $100.00 due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 08N09
MIAMI, FLORIDA 33128-7716

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

CASE NUMBER DEFENDANT AND CO-DEFENDANT NAMES (INCLUDING DEFENDANT NUMBER)	**TOTAL AMOUNT**	**JOINT AND SEVERAL AMOUNT**

The Defendant's right, title and interest to the property identified in the preliminary order of forfeiture, which has been entered by the Court and is incorporated by reference herein, is hereby forfeited.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
CASE NO. 14-20064-CR-MARTINEZ

UNITED STATES
OF AMERICA

Plaintiff,

v.

MARCELO MANRIQUE,

Defendant. /

NOTICE OF APPEAL

(Filed Jul. 8, 2014)

Notice is hereby given that Marcelo Manrique, defendant in the above named case, hereby appeals to the United States Court of Appeals for the Eleventh Circuit from the final judgment and sentence entered in this action on the 24th day of June, 2014.

Respectfully Submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

BY: s/R. D'Arsey Houlihan
R. D'Arsey Houlihan
Supervisory Assistant Federal
Public Defender
Florida Bar No. 100536
150 W. Flagler Street, Suite 1700
Miami, Florida 33130-1556
(305) 530-7000

(305) 536-4559, Fax
d'arsey_houlihan@fd.org, E-Mail

CERTIFICATE OF SERVICE

I hereby certify that on **July 8, 2014,** undersigned electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

s/R. D'Arsey Houlihan
R. D'Arsey Houlihan

SERVICE LIST
UNITED STATES v. MARCELO MANRIQUE
CASE NO. 14-20064-CR-MARTINEZ

United States District Court,
Southern District of Florida

R. D'Arsey Houlihan
Supervisory Assistant Federal Public Defender
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CRIMINAL MINUTES FOR
HON. JOSE E. MARTINEZ

Date: September 17, 2014 Case No: 14-20064-CR-MARTINEZ
Clerk: Wanda Holston Reporter: Dawn Whitmarsh
Interpreter: _____ Probation Officer: Marilys Martinez for Shannon Culberson

UNITED STATES OF AMERICA vs.
Marcelo Manrique

AUSA: Brooke Watson

Defendant(s) Counsel(s): D'Arsey Houlihan

Defendant(s) Present: X Not Present ___
In Custody X

Reason for hearing: Restitution Hearing

Result of hearing: Hearing Held

1. All parties present. Based on the materials submitted to the Court, a restitution amount is imposed. See Amended Judgement for details.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
CASE NO. 14-20064-CR-JEM

UNITED STATES
OF AMERICA,

Plaintiff,

vs.

MARCELO MANRIQUE,

Defendant.

Miami, Florida
September 17, 2014

TRANSCRIPT OF RESTITUTION HEARING
BEFORE THE HONORABLE JOSE E. MARTINEZ
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:
United States Attorney's Office
BY: BROOKE WATSON, A.U.S.A.
99 N.E. 4th street
Miami, Florida 33132

FOR THE DEFENDANT:
Federal Public Defender's Office
BY: RAYMOND D'ARSEY HOULIHAN, A.F.P.D.
150 West Flagler Street
Miami, Florida 33130

REPORTED BY: **DAWN M. WHITMARSH, RPR**
Official Court Reporter
400 N. Miami Avenue, 10S03
Miami, Florida 33128
Telephone: 305-523-5598

[2] P-R-O-C-E-E-D-I-N-G-S

COURTROOM DEPUTY: Case number 14-20064-criminal-Martinez, United States of America versus Marcelo Manrique.

Counsel, please state your appearance.

MS. WATSON: Good afternoon, Brooke Watson on behalf of the United States.

THE COURT: Good afternoon, Ms. Watson.

MR. HOULIHAN: Good afternoon, Your Honor. D'Arsey Houlihan, Assistant Federal Public Defender on behalf of Mr. Manrique, who is present before the court.

THE COURT: Good afternoon.

I apologize for being late, I was in a meeting with Judge Gayles. That's what you get the big bucks for, Mr. Houlihan.

All right. Can I get an appearance from probation.

THE PROBATION OFFICER: Good afternoon, Your Honor. Marylis Martinez standing in for Shannon Culberson.

THE COURT: Good afternoon, Ms. Martinez.

All right. we're here on the restitution hearing on Mr. Marcelo Manrique. I've reviewed the memorandum prepared by the US Probation office, the original

judgment, the original presentence investigation and I'm ready to proceed at this time.

Ms. Watson, what do you want to present?

MS. WATSON: Your Honor, at this time it's my [3] understanding that as part of the probation packet, that you did information from Attorney Lenihan?

THE COURT: I did review that. I saw a letter that he had written.

MS. WATSON: As well as an affidavit.

What I can say is I have been in contact with the victims in this case who wanted to be notified about restitution. The "Angela" victim, through her attorney, was the only victim that indicated they were seeking restitution in this case. I informed them that, you know, in most of these – in most instances it's best to be present at a restitution hearing for the attorney to state their case. I also indicated that the defendant, Mr. Manrique, is indigent and that he may not be able to pay the amount that they were seeking.

THE COURT: Why is that different from any other restitution hearing that I've ever been at?

MS. WATSON: It's not. I just – in terms of my conversations with them. So what I did is, you know, I suggested resolving this case with a $1,000 to $1,500 restitution amount that both parties could agree on.

You know, the victims, you know, I think their position is that this child, who was three to four years old when these things were happening, is going to be dealing with this pain for the rest of their life.

THE COURT: I can understand that position.

[4] MS. WATSON: Hoping for, you know, some sort of gesture, some sort of restitution. You know, pursuant to 18 USC 2259, restitution is mandatory. I would suggest that though the victim and her attorney are not here, they did provide a sworn affidavit that outlined the proximate cause that they believe this defendant caused them, which under *Paroline versus United States* is the standard they're dealing with.

So they were requesting somewhere between, I think the bottom line was $7,320 to $11,740.

THE COURT: I thought it was 16,000?

MS. WATSON: 16,000 is on the front page. I was just going based on the proximate cause. I'm sorry. 16,000 is the high end and I believe –

THE COURT: 14,000 is the low end, isn't it?

MS. WATSON: Correct.

You know, I understand – you know, I had an opportunity to speak to counsel prior to the hearing. I know he wanted or – I don't want to speak for counsel, but it's my understanding –

THE COURT: 11,980 to 16,400 is the range.

MS. WATSON: Yes. I understand the wanting to cross examine the attorney. I believe that's what he represented to me, that he wanted a witness here that he could speak to.

But I will say that, you know, I believe that the government has provided an ample basis to support the [5] restitution that's being requested in this case under *Paroline versus the United States*, and under 18 USC 2259(b)(3)(f). We've demonstrated through these documents the mental – the medical bills that this victim has had to pay, the psychiatric bills that this victim has had to pay, the physical pain that this has caused her, the attorney's fees that she's endured and that she will continue to endure as this case continues to be litigated.

Again, this is something she's going to be dealing with for the rest of her life. The defendant's part of the overall phenomenon, that is the possession of child pornography in this case, caused the victim's general loss and as a result the government is seek something meaningful in terms of restitution, not a token amount.

THE COURT: How in the world can I come up with anything other than what they ask for? I mean, I don't understand why I could make, let's say, $2,750. I mean, how can I make something up?

MS. WATSON: I think what we were trying to do was come to a resolution prior to having a hearing and that was my conversation with the victim's attorney. Maybe if we can all meet together and come to

some amount, it would at least show the victim – you know, help her out in her expenses.

THE COURT: So it's my understanding that they don't want to do that; is that right?

MS. WATSON: They did. I mean, they want full [6] restitution. They want the amount that's in these documents.

THE COURT: But they're willing to take less.

MS. WATSON: They were willing to let me negotiate prior to a hearing, but my understanding is that there's no room to negotiate.

THE COURT: But the defendant is not interested in that.

MS. WATSON: Correct. So at this time, I would ask for what the victim is requesting.

THE COURT: All right, Mr. Houlihan, tell me what you think I ought to do.

MR. HOULIHAN: Judge, I don't think that – well, first of all, I would just note that according to *Paroline*, that's 134 Supreme Court, 710, the government bears the burden of establishing by the preponderance of the evidence the victim's losses.

THE COURT: What can they use to do that? Can't they use affidavits?

MR. HOULIHAN: I don't believe that the affidavit they provided here is sufficient.

THE COURT: That doesn't answer my question. They can use affidavits, but you don't think this one is sufficient?

MR. HOULIHAN: I don't believe they can use affidavits.

THE COURT: You don't think they can.

MR. HOULIHAN: I think they have to produce witnesses. [7] I know in this case, *Paroline*, they produced an expert witness who testified in a Florida case. This predates *Paroline*, so I'm not so sure whether the holding as it relates to causation is still valid.

But in *United States versus McDaniel*, which is 631, F3, 1204, the government produced a Dr. Randall Green as an expert on the impact of psychological trauma, and that individual was present for cross-examination.

And what they've provided here is an evaluation that focuses almost exclusively on the actions of the father who sexually abused this victim and the impact of his actions upon her. There is about a half a paragraph in this seven page evaluation that he mentions – and by the way, the fact that these images are out there is continuing to harm her, but it's cursory and it doesn't – in my mind, isn't sufficient to establish proximate cause in this case.

I mean, in *Paroline*, the court mentioned that the court has to start or may start to determine the amount of the victim's losses caused by the continuing traffic in the victim's images, and then base an award on factors bearing on the relative causal significance of the defendant's conduct in producing those losses. They merely – this evaluation states at great length the damage caused by the father that produced these images, but it has no meaningful discussion of what damage was caused by or what continuing damage is caused by the [8] dissemination of these images.

The attorney's estimate of his expenses, there are a variety of things in here that I just don't know – I don't know what they are. For example, there is – there's something – well, let me step back. There are things – anticipated expenses for things like initial prep of parole opposition materials. Well, that's a nonissue in this case. Final prep of parole opposition materials. Notification of parole hearing. First of all, I don't know how they know that they would necessarily oppose, but it's sort of a nonissue because there is no parole in the federal system.

There are things in here conference with defense attorney. That hasn't happened. I mean, I know that personally that that hasn't happened.

There are things like VNS notices and defendant personal information, PACER. They're line items that I have no idea what they're for.

He goes on to base the rates and say that these rates are appropriate because, for example, one of the

lawyers who's billed out at $400 an hour, he says it's merited because that individual was a defense attorney for 15 years before joining this firm. Well, I've been a defense attorney for 15 years and nobody in their right mind –

THE COURT: I'd gladly pay you $400 an hour, Mr. Houlihan. Come on now.

[9] MR. HOULIHAN: I was just going to say nobody in their right mind would pay me that.

THE COURT: That's not inconsistent with the fact that they would.

MR. HOULIHAN: He talks about the paralegals being billed out at $150 an hour, and as a basis for that he says they're smart, kind and dedicated and they're lucky to have them. I'm sure that's all true, but Judge, to base an award on they're smart, kind and diligent, I mean, that's more than our CJA lawyers get, and I think they're at the very least smart and dedicated.

So, you know, I mean, these are just sort of – they're conclusory assertions.

THE COURT: What do you think is a fair amount?

MR. HOULIHAN: Based on this record? Zero, Judge. I'm sorry, they haven't proved it. They've got a burden of proof and they haven't met it. I've got a young man who – to the extent that he's able to earn anything, would like to send money to his family. And

he's told me listen, if I get out and I can find a job, which I think is exceedingly unlikely given the fact that I'm going to have to register for the rest of my life, if I can and I can make some money and I can send to it this girl, I'll do it.

But I just don't think based on the evidence before the court – we're sympathetic to this girl's plight, but I'm [10] sympathetic to my client as well and there is a burden of proof on the government and this just does not establish it, Judge. I mean, I have plenty more to say.

THE COURT: All right. But you acknowledge that they did give an affidavit, although you don't think it's sufficient.

MR. HOULIHAN: An affidavit from the attorney with regard to his expenses, including items that I know for a fact have not occurred like conference with defense attorney. So – you know, and things like parole hearing which don't exist. This is a boilerplate thing that he's printed off and produced and has no relationship with my particular client, and that's the only – and that, that information in his affidavit, frankly, I think is insufficient and that's stuff that he has personal knowledge of. The rest of it, there's no affidavits. There's an evaluation from a woman that I have no idea what her qualifications are.

You know, I have –

THE COURT: Do you quibble with his calculations in his letter or in his affidavit, I guess it is,

that concern the loss that she has in total which is substantially more than $17,000? I mean, I can't imagine how you could possibly accurately calculate the damage that has been done to this child and that continues to be done to this child as these videos are distributed.

You know, I don't even know – what did your client get [11] convicted of? Was distribution, wasn't it?

MR. HOULIHAN: No, Your Honor. It was –

THE COURT: Strictly possession?

MR. HOULIHAN: Well, I think this was a situation where –

THE COURT: This was Judge Jordan's case, correct?

MR. HOULIHAN: No, Judge. This was before Your Honor.

THE COURT: It was? I don't remember it. They all start to blend together.

MR. HOULIHAN: It was a plea. I mean, obviously wasn't a trial.

THE COURT: Okay.

MR. HOULIHAN: But he had images. As I understand it, I attempted to confirm this with the agent, she was not returning my –

THE COURT: Ms. Watson might know. She seems to be trying to tell us.

MS. WATSON: Just – there were a total of 1,200 image files, 182 videos. At least one of the videos was nine minutes and 53 seconds in length.

THE COURT: How many of them involve this "Angela" victim?

MS. WATSON: If you give me one second, I can count them.

MR. HOULIHAN: I can give you – it's approximately a [12] dozen.

THE COURT: A dozen what? Videos? Or –

MR. HOULIHAN: Images. I would say a dozen to a dozen and a half still images.

THE COURT: There are no videos of this victim.

MR. HOULIHAN: No. No. Not of this –

MS. WATSON: There were no videos. I'm just trying to pull up –

THE COURT: Goodness, you keep this on your phone?

MS. WATSON: You know, I do the –

MR. HOULIHAN: It's in – I apologize, Judge. It's probably more than that.

MS. WATSON: It looks like about 45 images.

MR. HOULIHAN: 45?

THE COURT: 45 still images.

MR. HOULIHAN: It is 45 images. I actually went and looked at the images. I didn't count them. I just made sure that there was at least one image that qualified.

THE COURT: Mr. Houlihan, here's my problem. Here we have a case where your client was convicted of possession of visual depictions of child pornography, victims of child pornography are entitled to compensation. Admittedly, it's not easy to compute what the compensation should be, but I'm looking through the plea agreement to see if it is of any assistance. I would think that I would have the right to listen to – I don't [13] think I have to have children come in and testify as to the effect of this on them. I think that I have the right to use my God-given common sense to say that this is obviously going to hurt them for the rest of their lives, and the question is how do you evaluate the amount of restitution that should be made?

And I think that you – the amount of restitution would be huge, but I don't think that your client is required to pay for all of it. And the question is how do you split it up? And it's a very difficult exercise, and I just think I got to do the best I can with it and I'm going to set a restitution figure on your client. Honestly, most of the restitution that I set is like a empiric exercise, like I'm making it up for the fun of it because I don't think very many of them ever pay more than a very,

very, very small percentage of the amount that is levied as restitution.

I think I have to come up with something that is restitution to this young woman who was a child at the time that these pictures were created. I hear you. Go ahead.

MR. HOULIHAN: I appreciate the court's sentiment and I understand what you're saying. But it would be my position that according to *Paroline* and according to Eleventh Circuit existing case law, the government bears the burden. I agree, this is a difficult calculation to make, but I don't think you can make a calculation if the government hasn't met its burden by producing witnesses who can testify and be subject to cross-examination [14] regarding where these figures come from. We have conclusory figures provided by a psychologist of unknown origin. I mean, I'm not suggesting that she's not who she purports to be, but I have no idea who she is.

And I just think on this record, Judge, on this record, the court is precluded from ordering restitution.

THE COURT: Ms. Watson?

MS. WATSON: Your Honor, my understanding about restitution is that the confrontation clause does not extend to restitution hearings. The government has provided an affidavit. The government has provided on page six of treatment needs detailed accounts of what this victim is going to need to pay over the course of her life to overcome what happened. And

this is – but for this industry existing, this abuse wouldn't have happened. But for the defendant downloading these 45 images of this four year old child being forced to perform oral sex on her father, you know, we wouldn't be here right now.

You can see on page six she is estimated at 50 to 100 sessions at $85 an hour for group therapy for victims of child sexual abuse. Familiar therapy at $200 a session. There's an estimated 150 to 200 sessions. Medical evaluation and management by a board certified psychiatrist, 75 to 100 sessions at $250 per session. I mean, anyone who has received any sort of medical treatment knows that these are routine costs associated with medical treatment, with mental health treatment, [15] anyone who has been in and out of the court.

So even if counsel is quibbling with $100 here or $200 there in terms of court fees, there's absolutely no doubt this victim is going to be paying for this both emotionally and out of her pocket for the rest of her life. The government has provided information to the court to that effect. Certainly the government is not asking for the total amount which –

THE COURT: 300, 400,000, a lot of money. Mid-six figures.

MS. WATSON: I would suggest in terms of calculating, this defendant had 45 images. The sessions, the mental health sessions, all of the treatment

sessions range between $85 a session and $200 a session. I would suggest $100 per image which would be $4,500 in restitution.

MR. HOULIHAN: Judge, let me just point out –

THE COURT: Go ahead.

MR. HOULIHAN: The numbers that this individual put into her report as to how many sessions are needed, there's just no indication as to how she came up with –

THE COURT: Well, but she didn't go by that. She went by 45 images, $100 an image.

MS. WATSON: A thousand dollars an image. It was $4,500 was my total.

THE COURT: Well, a thousand dollars an image is $45,000.

[16] MS. WATSON: 100. Yes. I'm sorry.

THE COURT: So $100. See, I was right. See the law of averages. I'm bound to be right once in a while.

You know what, Mr. Houlihan? I don't know the right answer to this. I hope that the Eleventh circuit will give me some guidance if they feel that I'm wrong on this, but I you have to just take a position on it and as far as I'm concerned, I believe that the young woman is entitled to some restitution from this defendant and I don't know of any other way of determining

it other than to come up with a per-image charge. And I think the $100 is a reasonable amount.

And I think that based on the materials submitted, which I believe, and I don't think that you can disregard them, I'm going to order restitution in the amount of $4,500 to the victim in this case and I'm prepared to make the formal announcement at this point.

Be happy to hear anything further from you.

MR. HOULIHAN: Judge, we stand by our objections.

THE COURT: I want to give the respondent or defendant, whatever it is, the opportunity to respond if he wishes.

THE DEFENDANT: Yes, Your Honor.

THE COURT: Okay. Stay seated. It's easier to talk. You know what, hold it a second. Hold it a second. I think that you should be careful because I would assume that your attorney is going to – may or may not appeal this, and, you [17] know, whatever you say –

THE DEFENDANT: I'm not going to say anything to jeopardize that.

THE COURT: Okay. All right. I just want you to be aware. Go ahead.

THE DEFENDANT: All I wanted to say was I don't know who any of these people are and when I read – when I read the report and I read her story, it just broke my heart. And like my attorney said, I had

told him this when I spoke to him earlier this week, that if there was any way that I could pay for this later on, I would.

But right now, I don't have any money and any money that I make in here is going to be basically almost nothing and I want to send as much of that as I can to my family. My –

THE COURT: You know, I really understand that, but the fact of the matter is that that is what everyone can say in these matters, that you didn't know them. The problem is that if people didn't buy and distribute these images, there wouldn't be a market for them and perhaps children would not be as abused as often as they are. That's all I'm saying is that it doesn't matter if you knew them. You know, these materials are a permanent record of their participation in these sexual acts that were apparently forced upon them, and that's just a horrible situation and it's just made worse by the circulation of these documents. And, you know, just the possession of them [18] victimizes those children that are depicted in those images.

And while I understand that you want – you would like to spend your money the way you want to spend it, what little money you're going to be making, the fact of the matter is that I think that this victim is entitled to some compensation and so I'm going order it. I'll be happy to hear anything further that you might have to say. I just want you to know where I'm coming from.

MR. HOULIHAN: I don't think we have anything further at this time, Your Honor.

THE COURT: All right. Anything further from the government?

MS. WATSON: No thank you, Your Honor.

THE COURT: It is ordered the defendant shall pay restitution in the amount of $4,500.

During the period of incarceration, payment shall be made as follows:

If the defendant earns wages in a Federal Prison Industries UNICOR job, then the defendant must pay 50 percent of wages earned toward the financial obligations imposed by this judgment in a criminal case. If the defendant does not work in a UNICOR job, then the defendant must pay a minimum of $25 per quarter toward the financial obligations imposed in this order.

Upon release from incarceration, the defendant shall pay restitution at the rate of 10 percent of monthly gross [19] earnings until such time as the court may alter that payment schedule in the interests of justice. The US Bureau of Prisons, US Probation office and US Attorney's office shall monitor the payment of restitution and report to the Court any material change in the defendant's ability to pay. These payments do not preclude the government from using any other anticipated or unexpected financial gains, assets or income of the defendant to certify the restitution obligations. The restitution shall be made payable to Clerk, United States Courts and forwarded to US clerk's office, attention financial section, 400 North Miami Avenue, Room 8N09, Miami, Florida, 33128.

The restitution will be forwarded by the clerk of the court to the victim on the attached list.

Good luck to you, Mr. Manrique.

MR. HOULIHAN: Thank you, Judge.

THE COURT: We'll be in recess. Thank you. Thank you Ms. Martinez or cousin Marylis.

(PROCEEDINGS CONCLUDED)

United States District Court
Southern District of Florida
Miami Division

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE**
v.	(Filed Sep. 18, 2014)
MARCELO MANRIQUE	Case Number: **14-20064-CR-MARTINEZ** USM Number: **02081-104** Counsel For Defendant: **Raymond D'Arsey Houlihan** Counsel For The United States: **Brooke Watson** Court Reporter: **Dawn Whitmarsh**

Date of Original Judgment: 6/23/2014
(or Date of Last Amended Judgment)

AMENDMENT REASON(S):
Modification of Restitution Order (18 U.S.C. §3664)

The defendant pleaded guilty to count(s) 1 of the Information.

The defendant is adjudicated guilty of these offense(s):

TITLE & SECTION	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18 U.S.C.§ 2252(a)(4)(B)	possession of material involving the sexual exploitation of minors	01/10/2014	1

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

Date of Imposition of Sentence:
9/17/2014

/s/ Jose E. Martinez
Jose E. Martinez
United States District Judge

Date: 9/18/14

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **72 months** as to Count One of the Information.

The court makes the following recommendations to the Bureau of Prisons: The defendant shall be assigned to a facility as close to South Florida as possible commensurate with his background and the offence of which he stands convicted.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

_____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **life** as to Count One.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;

2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first fifteen days of each month;

3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4. The defendant shall support his or her dependents and meet other family responsibilities;

5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6. The defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony,

unless granted permission to do so by the probation officer;

10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11. The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

Adam Walsh Act Search Condition – The defendant shall submit to the U.S. Probation Officer conducting periodic unannounced searches of the defendant's person, property, house, residence, vehicles, papers, computer(s), other electronic communication or data storage devices or media, include retrieval and copying of all data from the computer(s) and any internal or external peripherals and effects at any time, with or without warrant by any law enforcement or probation

officer with reasonable suspicion concerning unlawful conduct or a violation of a condition of probation or supervised release. The search may include the retrieval and copying of all data from the computer(s) and any internal or external peripherals to ensure compliance with other supervision conditions and/or removal of such equipment for the purpose of conducting a more thorough inspection; and to have installed on the defendant's computer(s), at the defendant's expense, any hardware or software systems to monitor the defendant's computer use.

Computer Possession Restriction – The defendant shall not possess or use any computer; except that the defendant may, with the prior approval of the Court, use a computer in connection with authorized employment.

Employer Computer Restriction Disclosure – The defendant shall permit third party disclosure to any employer or potential employer, concerning any computer-related restrictions that are imposed upon the defendant.

Mental Health Treatment – The defendant shall participate in an approved inpatient/outpatient mental health treatment program. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

No Contact with Minors – The defendant shall have no personal, mail, telephone, or computer contact with children/minors under the age of 18 or with the victim.

No Contact with Minors in Employment – The defendant shall not be employed in a job requiring contact with children under the age of 18 or with the victim.

No Involvement in Youth Organizations – The defendant shall not be involved in any children's or youth organization.

Restricted from Possession of Sexual Materials – The defendant shall not buy, sell, exchange, possess, trade, or produce visual depictions of minors or adults engaged in sexually explicit conduct. The defendant shall not correspond or communicate in person, by mail, telephone, or computer, with individuals or companies offering to buy, sell, trade, exchange, or produce visual depictions of minors or adults engaged in sexually explicit conduct.

Self-Employment Restriction – The defendant shall obtain prior written approval from the Court before entering into any self-employment.

Sex Offender Registration – The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense.

Sex Offender Treatment – The defendant shall participate in a sex offender treatment program to include psychological testing and polygraph examination.

Participation may include inpatient/outpatient treatment, if deemed necessary by the treatment provider. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$100.00	$0.00	**$4,500.00**

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

NAME OF PAYEE	TOTAL LOSS*	RESTITUTION ORDERED	PRIORITY OR PERCENTAGE
Marc C. Lenahan	$0.00	$4,500.00	

Restitution with Imprisonment – It is further ordered that the defendant shall payment restitution in the amount of **$4,500.00**. During the period of incarceration, payment shall be made as follows: (1) if the

defendant earns wages in a Federal Prison Industries (UNICOR) job, then the defendant must pay 50% of wages earned toward the financial obligations imposed by this Judgment in a Criminal Case; (2) if the defendant does not work in a UNICOR job, then the defendnat must pay a minimum of $25.00 per quarter toward the financial obligations imposed in this order.

Upon release of incarceration, the defendant shall pay restitution at the rate of 10% of monthly gross earnings, until such time as the court may alter that payment schedule in the interests of justice. The U.S. Bureau of Prisons, U.S. Probation Office and U.S. Attorney's Office shall monitor the payment of restitution and report to the Court any material change in the defendant's ability to pay. These payments do not preclude the government from using any other anticipated or unexpected financial gains, assets or income of the defendant to satisfy the restitution obligations. The restitution shall be made payable to Clerk, United States Courts, and forwarded to the address below.

The restitution will be forwarded by the Clerk of the Court to the victims on the attached list.

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

**Assessment due immediately unless otherwise ordered by the Court.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A. Lump sum payment of $100.00 due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 08N09
MIAMI, FLORIDA 33128-7716

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount,

Joint and Several Amount, and corresponding payee, if appropriate.

CASE NUMBER DEFENDANT AND CO-DEFENDANT NAMES (INCLUDING DEFENDANT NUMBER)	**TOTAL AMOUNT**	**JOINT AND SEVERAL AMOUNT**

The Defendant's right, title and interest to the property identified in the preliminary order of forfeiture, which has been entered by the Court and is incorporated by reference herein, is hereby forfeited.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 14-13029
Non-Argument Calendar

D.C. Docket No. 1:14-cr-20064-JEM-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MARCELO MANRIQUE,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(July 15, 2015)

Before TJOFLAT, WILSON and BLACK, Circuit Judges.

PER CURIAM:

Marcelo Manrique appeals his life term of supervised release and the restitution award ordered after he pled guilty to one count of possession of material involving a minor engaging in sexually explicit

conduct, in violation of 18 U.S.C. § 2252(a)(4)(B) and (b)(2). On appeal, he argues: (1) the district court erred procedurally in imposing a life term of supervised release because it failed to adequately explain the sentence and consider the required 18 U.S.C. § 3553(a) factors; (2) the life term of supervised release was substantively unreasonable; and (3) the district court imposed an erroneous restitution amount. We will address each of these contentions in turn. After review, we affirm.

I. DISCUSSION

As the parties are familiar with the facts of this case, we will not recount them in detail. We include only those facts necessary to the discussion of each issue.

A. Procedural Reasonableness

The reasonableness of a sentence is generally reviewed through a two-step process. *United States v. Pugh*, 515 F.3d 1179, 1190 (11th Cir. 2008). The first step is to "ensure that the district court committed no significant procedural error such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence." *Gall v. United States*, 552 U.S. 38, 51 (2007).

Manrique did not clearly articulate an objection to his sentence on procedural grounds, and therefore we review his procedural reasonableness claim for plain error. *See United States v. Vandergrift*, 754 F.3d 1303, 1307 (11th Cir. 2014) (stating when a party does not clearly articulate an objection on procedural grounds at the time of sentencing, plain error review is appropriate). The record shows the district court stated it had considered the § 3553(a) factors before announcing its total sentence, and added it thought the sentence was fair in light of all of the § 3553(a) factors. Additionally, the court stated it had considered the parties' arguments – such as Manrique's argument in favor of a 15-year term of supervised release. Moreover, Manrique does not argue the court improperly calculated or failed to calculate the Guidelines range, and the record reflects the court referred to the Guidelines as advisory, indicating it did not treat them as mandatory. Manrique also does not point to any clearly erroneous facts upon which the district court based his term of supervised release, nor does the record reveal any. As to Manrique's argument the district court did not adequately explain the sentence, the court explained it did not think Manrique was a danger to recidivate and the sentence was sufficient but not excessive to perform a deterrent function. Considering the court imposed a Guidelines term of supervised release, the explanation was sufficient to demonstrate the court considered the parties' arguments and had a reasoned basis for exercising its authority. *See Rita v. United States*, 551 U.S. 338, 356 (2007) ("The sentencing judge should set forth enough to satisfy the

appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority."). For the foregoing reasons, Manrique cannot show plain error. *United States v. Rodriguez*, 398 F.3d 1291, 1298 (11th Cir. 2005) (stating under plain error review, there must be (1) an error, (2) that is plain, (3) that affect the defendant's substantial rights, and (4) seriously affects the fairness or integrity of the judicial proceedings).

B. Substantive Reasonableness

The second step when determining the reasonableness of a sentence is review for substantive reasonableness. *United States v. Talley*, 431 F.3d 784, 788 (11th Cir. 2005). Substantive reasonableness review seeks to "evaluate whether the sentence imposed by the district court fails to achieve the purposes of sentencing as stated in section 3553(a)." *Id.* The court must impose a sentence "sufficient, but not greater than necessary to comply with the purposes" listed in § 3553(a)(2), including the need to reflect the seriousness of the offense, deter criminal conduct, and protect the public from the defendant's future criminal conduct. *See* 18 U.S.C. § 3553(a)(2). In imposing a particular sentence, the court must also consider the nature and circumstances of the offense, the history and characteristics of the defendant, the kinds of sentences available, the applicable Guidelines range, pertinent policy statements, the need to avoid unwarranted sentencing disparities, and the need to provide restitution to victims. *Id.* § 3553(a)(1), (3)-(7).

The Sentencing Guidelines state the term of supervised release may be up to life if the offense at issue is a sex offense, and recommend the statutory maximum term of supervised release if the offense of conviction is a sex offense. U.S.S.G. § 5D1.2(b)(2). The statutorily authorized term of supervised release for a § 2252 offense is five years to life. 18 U.S.C. § 3583(k).

The record shows the district court weighed the § 3553(a) factors when deciding on a sentence, and it was not necessary for it to lay them out one by one. *See United States v. Robles*, 408 F.3d 1324, 1328 (11th Cir. 2005) (stating district courts do not have to conduct an accounting of every § 3553(a) factor and explain the role each played in the sentencing decision). Still, it specifically discussed the need for deterrence balanced with its belief Manrique was not a recidivism risk. Even if the court favored some factors over others, it was within its discretion to do so. *See United States v. Brown*, 772 F.3d 1262, 1267 (11th Cir. 2014) (stating it is within the court's discretion to afford one factor greater weight). Furthermore, the sentence imposed by the district court was within the Guidelines range, and was in accord with the Guidelines' recommendation that the supervised release term be the statutory maximum, which indicates reasonableness. *See Talley*, 431 F.3d at 788 ("[W]hen the district court imposes a sentence within the advisory Guidelines range, we ordinarily will expect that choice to be a reasonable one."). Based on the foregoing, the district court's decision to impose a life term of supervised release does not leave a "definite and firm conviction" that it committed a

clear error in judgment. *See United States v. Irey*, 612 F.3d 1160, 1190 (11th Cir. 2010) (en banc) (stating we will vacate a sentence imposed by a district court only when left with a "definite and firm conviction that the district court committed a clear error of judgment").

C. Restitution

We must resolve jurisdictional issues before addressing the merits of underlying claims, and have an obligation to review *sua sponte* whether we have jurisdiction. *United States v. Cartwright*, 413 F.3d 1295, 1299 (11th Cir. 2005). Absent the filing of a timely notice of appeal, we are without jurisdiction to review the decision on the merits. *Id.* We review questions regarding our subject matter jurisdiction *de novo*. *Id.*

We previously held an appeal from a sentencing judgment that deferred restitution was premature and did not ripen until the district court either (1) ordered restitution or (2) lost the power to do so after 90 days. *See United States v. Kapelushnik*, 306 F.3d 1090, 1093-94 (11th Cir. 2002). However, the Supreme Court later held "[t]he fact that a sentencing court misses the statute's 90-day deadline . . . does not deprive the court of the power to order restitution." *Dolan v. United States*, 560 U.S. 605, 611 (2010). We subsequently recognized, in light of *Dolan*, the *Kapelushnik* framework created an injustice because it was possible for an appeal to never ripen, and addressed whether judgments that deferred the issue of restitution were nevertheless final for appellate jurisdiction purposes. *United States v.*

Muzio, 757 F.3d 1243, 1246 (11th Cir.), *cert. denied* 135 S. Ct. 395 (2014).

In *Muzio*, the district court entered a judgment sentencing the defendant to 163 months' imprisonment and stating restitution would be ordered but the determination of the amount would be deferred for 90 days, with an amended judgment entered after such determination. *Id.* at 1245. The defendant appealed that judgment, and an amended judgment reflecting the amount of restitution was never entered. *Id.* at 1245-46. However, we determined judgment was nonetheless final for purposes of appeal because it sentenced the defendant to a term of imprisonment. *Id.* at 1247 We concluded "a judgment imposing a prison sentence and restitution but leaving the specific amount of restitution unsettled is immediately appealable." *Id.* at 1250. We acknowledged the rule could "lead to bifurcation of some defendants' cases," but stated "[i]f a subsequent judgment is entered ordering restitution, the defendant may separately appeal that order, and the appeal may be heard separately or consolidated with the initial appeal if that has not yet been resolved," or a defendant could avoid bifurcation by waiting to appeal until restitution was resolved. *Id.* As such, we held when courts enter sentencing judgments ordering restitution but deferring determination of the amount, defendants have the option to either (a) timely appeal from the initial judgment and then, if desired, timely appeal from the subsequent judgment finalizing the amount of restitution, or (b) timely appeal from the subsequent judgment only, in which case all issues will be heard in a single appeal. *Id.* at 1250 n.9.

We do not have jurisdiction to entertain Manrique's challenge to his restitution amount because he did not file a notice of appeal designating the amended judgment setting forth the restitution amount. *See Cartwright*, 413 F.3d at 1299. In his reply brief, Manrique argues *Muzio* is inapplicable because the amended judgment was never filed in that case, but *Muzio*'s discussion of a bifurcated appeals process shows its ruling also applies in situations such as this where an amended judgment was later filed. *See Muzio*, 757 F.3d at 1250. Manrique also argues his premature notice of appeal ripened following the entry of the amended judgment, but that argument relies on the *Kapelushnik* framework, which *Muzio*'s framework replaced. *See id.* at 1246. Under *Muzio*, Manrique was required to either appeal both the original judgment and the amended judgment, or appeal the amended judgment only. *Id.* at 1250 n.9. Instead, he appealed only the original judgment. Therefore, Manrique's challenge to the restitution order is dismissed for lack of jurisdiction. *See Cartwright*, 413 F.3d at 1299.

II. DISCUSSION

Accordingly, we affirm Manrique's sentence as set forth in the district court's original judgment, and dismiss his challenge to the restitution amount reflected in his amended judgment for lack of jurisdiction.

AFFIRMED IN PART, DISMISSED IN PART.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 14-13029-BB

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MARCELO MANRIQUE,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(Filed Sep. 11, 2015)

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

BEFORE: TJOFLAT, WILSON and BLACK, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc

(Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT

/s/ Susan H. Black
UNITED STATES CIRCUIT JUDGE

Supreme Court, U.S.
FILED
JUL - 8 2016
OFFICE OF THE CLERK

No. 15-7250

In The Supreme Court of the United States

MARCELO MANRIQUE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF PETITIONER

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QUESTION PRESENTED FOR REVIEW

Whether a notice of appeal filed after a district court announces its sentence, but before it amends this sentence to specify a restitution amount, automatically matures to perfect an appeal of the amended judgment.

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

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C. Assuming, *arguendo*, that an irregularity occurred, dismissal was improper because the requirements for perfecting an appeal in federal criminal cases are not jurisdictional, but rather are governed by the substantial prejudice test of Fed. R. Crim. P. 52(a) 32

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No. 15-7250

In The
Supreme Court of the United States

MARCELO MANRIQUE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, *United States v. Marcelo Manrique*, No. 14-13029, is not published in the Federal Reporter but is available at 618 F. App'x 579 (11th Cir. 2015), *reh'g en banc denied* (Sept. 11, 2015), and is set forth in the Joint Appendix at JA 78, 86. The district court's judgment imposing sentence, entered June 24, 2014, is set forth at JA 31, and its amended

judgment imposing sentence, entered September 18, 2014, is set forth at JA 66.

STATEMENT OF JURISDICTION

The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have appellate jurisdiction of all final decisions of United States district courts. The judgment of the Court of Appeals was entered on July 15, 2015. A timely petition for rehearing and rehearing *en banc* was denied on September 11, 2015. The petition for writ of certiorari was timely filed on December 2, 2015, invoking this Court's jurisdiction under 28 U.S.C. § 1254(1). The petition was granted on April 25, 2016.

STATUTORY PROVISIONS AND RULES INVOLVED

Rule 4, Federal Rules of Appellate Procedure Appeal as of Right – When Taken

* * *

(b) Appeal in a Criminal Case.

(1) Time for Filing a Notice of Appeal.

(A) In a criminal case, a defendant's notice of appeal must be filed in the district court within 14 days after the later of:

(i) the entry of either the judgment or the order being appealed; or

(ii) the filing of the government's notice of appeal.

* * *

(2) **Filing Before Entry of Judgment.** A notice of appeal filed after the court announces a decision, sentence, or order – but before the entry of the judgment or order – is treated as filed on the date of and after the entry.

Rule 52, Federal Rules of Criminal Procedure Harmless and Plain Error

(a) **Harmless Error.** Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

Title 18 U.S.C. § 2252(a)(4)(B)

§ 2252. Certain activities relating to material involving the sexual exploitation of minors

(a) Any person who –

* * *

(4) . . . (B) knowingly possesses, or knowingly accesses with intent to view, 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported using any means or facility of

interstate or foreign commerce or in or affecting interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if –

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct;

shall be punished as provided in subsection (b) of this section.

* * *

(b)(1) Whoever violates, or attempts or conspires to violate, paragraph (1), (2), or (3) of subsection (a) shall be fined under this title and imprisoned not less than 5 years and not more than 20 years. .

CHAPTER 227 – SENTENCES
Title 18 U.S.C. § 3556
Order of Restitution

The court, in imposing a sentence on a defendant who has been found guilty of an offense shall order restitution in accordance with section 3663A, and may order restitution in accordance with section 3663. The procedures under section 3664 shall apply to all orders of restitution under this section.

CHAPTER 232 – MISCELLANEOUS SENTENCING PROVISIONS
Title 18 U.S.C. § 3663A
§ 3663A. Mandatory restitution to victims of certain crimes

(a)(1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.

* * *

(c)(1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense –

* * *

(B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.

Title 18 U.S.C. § 3664
§ 3664. Procedure for issuance and enforcement of order of restitution

* * *

(d)(5) If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final

determination of the victim's losses, not to exceed 90 days after sentencing. If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief.

* * *

(o) A sentence that imposes an order of restitution is a final judgment notwithstanding the fact that –

(1) such a sentence can subsequently be –

(A) corrected under Rule 35 of the Federal Rules of Criminal Procedure and section 3742 of chapter 235 of this title;

(B) appealed and modified under section 3742;

(C) amended under section (d)(5); or

(D) adjusted under section 3664(k), 3572, or 3613A; or

(2) the defendant may be resentenced under section 3565 or 3614.

STATEMENT OF THE CASE

A. District Court Proceedings.

Marcelo Manrique pleaded guilty to violation of 18 U.S.C. § 2252(a)(4)(B), possession of material involving sexual exploitation of minors. On June 23, 2014, the district court sentenced Mr. Manrique to 72 months imprisonment, lifetime supervised release, and announced that "restitution is mandatory." JA 26-28.

A Judgment in a Criminal Case was filed the next day, June 24, 2014. It recites the terms of imprisonment and supervised release, and states that, "The determination of restitution is deferred until 8/22/2014. An Amended Judgment in a Criminal Case (AO245C) will be entered after such determination." JA 31, 39. Mr. Manrique filed a timely notice of appeal on July 8, 2014, directed to the final judgment and sentence. JA 42. The appeal was docketed by the Court of Appeals for the Eleventh Circuit under Case No. 14-13029. JA 8.

The district court held a restitution hearing on September 17, 2014, following a postponement of the original date. The government relied on a letter and affidavit prepared by an attorney for "Angela," a person portrayed in photographs, which sought restitution of $11,980 to $16,400. JA 45, 46, 48-49. Defense counsel objected, contending that the affidavit was boilerplate, inaccurate, erroneous and excessive, and that the government had not met its burden of proof to establish any victim loss under this Court's decision in *Paroline v. United States*, 572 U.S. ___, 134 S. Ct. 1710

(2014). JA 51-57, 61-62. In light of the objections, the government offered to settle the matter with agreed restitution of $1,000 to $1,500, JA 48, but defense counsel argued that the government failed to meet its burden to prove any amount of restitution. JA 51-57, 59, 61-62. The government then offered an alternative: There were 45 images at issue and the court should award $100 per image, $4,500. JA 60-61. The district court awarded $4,500 restitution with this explanation:

> THE COURT: * * * I don't know the answer to this. I hope the Eleventh [C]ircuit will give me some guidance if they feel that I am wrong on this, but you just have to take a position on it and as far as I'm concerned, I believe this young woman is entitled to some restitution from this defendant and I don't know any other way of determining it other than to come up with a per-image charge. And I think the $100 is a fair amount.

JA 61-62.

The district court entered a second Judgment in a Criminal Case, dated September 18, 2014. The caption of the second judgment specifically referenced the original judgment of "6/23/2014" and explained the reason for the "amendment" as "Modification of Restitution Order (18 U.S.C. § 3664)." The amended judgment is the same as the first in all respects except it specifies the dollar amount of restitution – $4,500 – and the manner in which it should be paid. JA 66, 74-75. Five

days later, on September 23, 2014, the district court clerk transmitted the amended judgment to the Court of Appeals, which filed it on the docket of the appeal already pending in that court. JA 10.

B. Court of Appeals Proceedings.

Mr. Manrique initiated an appeal of the judgment and sentence by filing a notice of appeal on July 8, 2014, following entry of the initial judgment. JA 42. The amended judgment including restitution was filed on the docket of the pending appeal on September 23, 2014. *See* COA Docket Sheet, Case No. 14-13029 (Sept. 23, 2014) ("USDC Restitution Order as to Appellant Marcelo Manrique was filed on 9/18/2014. Docket Entry 67"). JA 10. All transcripts of proceedings, including the restitution proceeding, were prepared and filed in the Court of Appeals before the Court of Appeals' Clerk issued a first briefing notice. JA 10.

The parties thereafter briefed the issues on appeal, including a challenge to the restitution portion of the judgment, between December 2014 – February 2015, months after both judgments had been entered and filed in the Court of Appeals under the single case number. The government did not challenge the Court of Appeals' jurisdiction over the restitution portion of the sentence, nor did the government allege it suffered any prejudice from a single notice of appeal. Instead, the government argued that Mr. Manrique's failure to file a second notice of appeal "operated as a waiver of

his right to appeal the district court's order of restitution." Br. Appellee 25.

The Court of Appeals addressed and rejected appellate challenges to the sentence of imprisonment and lifetime term of supervised release, but determined – *sua sponte* – that it lacked jurisdiction to decide the restitution issue because the appellant did not file a second notice of appeal once the second judgment was entered. JA 78, 85.

Mr. Manrique filed a petition for rehearing and rehearing *en banc*, which challenged the Court of Appeals' *sua sponte* decision that it lacked jurisdiction over the restitution question. The Court of Appeals denied rehearing and rehearing *en banc* on September 11, 2015. JA 86.

Mr. Manrique filed a timely petition for writ of certiorari, which the Court granted on April 25, 2016.

SUMMARY OF ARGUMENT

The Court's decision in *Dolan v. United States*, 560 U.S. 605 (2010), allows a district court to sentence a criminal defendant, including restitution generally, and later determine the precise amount of restitution to award under the Mandatory Victim Restitution Act. A judgment amending the sentence to detail restitution is then entered, which the Court has described as "essentially fill[ing] in an amount-related blank in a

judgment that made clear that restitution was 'applicable.'" 560 U.S. at 620. The *Dolan* decision acknowledged that "the interaction of [deferred] restitution orders with appellate time limits could have consequences," but left those matters undecided. One question left open is how many notices of appeal are required to perfect a single appeal of a judgment imposing sentence (including restitution, generally), and an amended judgment specifying the details of restitution.

Federal Rule of Appellate Procedure 4(b)(1)&(2) answers the question presented: A single notice of appeal perfects the appeal of a criminal judgment and sentence imposing restitution under the Mandatory Victim Restitution Act, as well as a later-entered amended judgment specifying the precise details of restitution. All but one circuit to have addressed the question have held that a single notice of appeal suffices. The Eleventh Circuit takes a contrary view, holding that it lacks jurisdiction to entertain an appeal of an amended judgment specifying the amount of restitution unless a second notice of appeal was filed.

The Eleventh Circuit's holding is incorrect for two reasons. First, the rules of practice and procedure governing criminal appeals allow a single notice to perfect an appeal of a judgment and sentence, as well as an amended judgment that essentially fills in the amount-related blank in a judgment that made clear that restitution was applicable. Second, the Eleventh Circuit's decision misapplied jurisdictional principles to alleged noncompliance with court rules, in place of

the applicable substantial-prejudice test of Fed. R. Crim. P. 52(a).

A. The Eleventh Circuit's conclusion that a second notice of appeal was due to be filed to perfect an appeal of the restitution issue is incorrect and fails to acknowledge the impact of Fed. R. App. P. 4(b)(2). Rule 4(b)(2) allows that "[a] notice of appeal filed after the court announces a decision, sentence or order – but before entry of the judgment or order – is treated as filed on the date of and after entry." The rule provides that a notice of appeal filed after a decision is announced, but before judgment is entered on the decision, matures or springs forward to embrace a later-filed judgment. It applies, as well, when the district court enters an intervening judgment that does not fully detail the court's full decision. When the amended judgment is entered that completes the initial judgment, it merges into the original incomplete judgment, so that the two judgments together become the final judgment. The earlier-filed notice of appeal then matures to embrace it. This interpretation is consistent with the *Restatement (Second) of Judgments*, as well as the decisions of the circuits holding that a single notice of appeal perfects appeal of both judgments, even if it is filed before entry of the amended judgment.

B. Applying Rule 4(b)(2) to appeals of an initial judgment imposing sentence, and an amended judgment filling in the blanks of restitution already awarded, generally, is consistent with the Federal Rules of Appellate Procedure, as well as the real-world practice of federal appeals in criminal cases.

As a threshold matter, the rules provide that a criminal appeal is perfected by the filing of a notice of appeal. The antiquated practice for delineating issues at the outset of a case by an assignment of errors was abolished as obsolete by the middle of the last century. Under the modern rules, a simple notice of appeal perfects the appeal. The issues to be addressed on appeal, and the portions of the judgment that are challenged, are first revealed during briefing by the parties. Permitting an earlier-filed notice of appeal to perfect an appeal of a later-filed judgment – especially one that simply fills in the blanks of restitution in an earlier judgment that made clear that restitution was applicable – is entirely consistent with the approach taken in the rules of appellate procedure.

Notably, rules of appellate procedure relevant to criminal cases do not specifically address the deferred amended judgment procedure contained in the Mandatory Victim Restitution Act, or as it is implemented by the Court's decision in *Dolan*. This is in contrast to other provisions of the rules, specific only to civil appeals, which are explicit about the need for amended notices of appeal when a judgment under appeal is thereafter altered. Recognizing that amendments are required in civil cases, there is also a specific exemption from the need to pay additional filing fees for amended notices of appeal. In contrast, there are no parallel rules addressing criminal appeals. The absence of such rules in the criminal subsections of Rule 4 has led courts and legal scholars to infer that there

is no requirement for an additional notice of appeal following an amended judgment specifying restitution, which is entered during an appeal of the initial judgment.

This interpretation of Rule 4(b)(2) is also consistent with modern appellate practice, in which electronic filing and dockets are the universal norm in the federal courts. Ensuring that an appeal includes the amended judgment and relevant transcripts is accomplished by an electronic filing. Mr. Manrique's case proves this: The amended judgment was filed on the docket of the Court of Appeals only five days after it was entered in the district court, and all relevant transcripts were filed months before briefing commenced. The docket sheet itself notes that the entire record on appeal is available electronically.

Interpreting Rule 4(b)(2) as being inapplicable to amended judgments in restitution appeals creates a trap for the unknowing litigant, the type of trap that the Court effectively abolished by the 1993 amendments to Rule 4. Such an interpretation would be inconsistent with the rules established by the 1993 amendments, which now specifically detail when amended notices of appeal are required for civil litigants. In a very real sense, it would open a trap for those litigating criminal appeals that the drafters of the rules closed as unfair in civil cases.

C. Appeals in criminal cases are governed by the Federal Rules of Appellate Procedure. The process for initiating an appeal and the time limit for doing so are

established by court rule only, not by statute. Although time limits set by statute are jurisdictional, time limits set by rule are not. For this reason, the Court's precedents hold that the time limit for initiating a criminal appeal is not jurisdictional. This Court held over six decades ago that alleged irregularities in filing a notice of appeal are to be evaluated under the substantial-prejudice test of Fed. R. Crim. P. 52(a).

Instead, the Eleventh Circuit categorically refused to entertain Mr. Manrique's appeal of the amount of restitution awarded based on a perceived failure to comply with the appellate rules for criminal appeals. The Court of Appeals held, *sua sponte*, that it lacked jurisdiction to entertain Mr. Manrique's appeal of the amount of restitution awarded as part of his sentence because a second notice of appeal was not filed after entry of the deferred amended judgment specifying the restitution award. Assuming, *arguendo*, that this irregularity occurred, it did not raise a jurisdictional bar to entertaining the appeal. Any such irregularity was due to be evaluated under Rule 52(a)'s substantial-prejudice test. Yet, the government did not allege, nor did the Court of Appeals find, any prejudice resulted from the absence of a second notice of appeal.

This case mirrors a typical deferred restitution appeal. At Mr. Manrique's sentencing hearing, the district judge pronounced terms of imprisonment and supervised release, and announced that restitution is mandatory. The final judgment imposing sentence deferred entry of the precise restitution amount, stating it would be contained in an amended judgment. Mr.

Manrique filed a notice of appeal. While the appeal of his sentence was pending, but before any briefing took place, a second judgment imposing sentence was entered, identical in all respects to the first, except it detailed the specifics of restitution. Both parties thereafter briefed the appeal, including a challenge to the restitution award.

Although the government never contended it was prejudiced by the absence of a second notice of appeal, the Court of Appeals independently perceived that the failure to file a second appeal was an irregularity. This perceived irregularity was due to be evaluated under Rule 52(a)'s substantial-prejudice test, under which it would have to be disregarded because no prejudice was alleged by the government nor found by the Court of Appeals. The Court of Appeals' mistaken jurisdictional analysis caused it to erroneously refuse to entertain the restitution issue, which was properly raised and fully briefed by both parties in the appeal.

It is difficult to imagine circumstances in which the government might be substantially prejudiced by the absence of a second notice of appeal. But should one occur, it is readily accommodated and ameliorated by existing rules of appellate procedure and practice.

ARGUMENT

A notice of appeal filed after a district court announces its sentence, but before it amends this sentence to specify a restitution amount, automatically matures to perfect an appeal of the amended judgment.

The Court's decision in *Dolan v. United States*, 560 U.S. 605, 608 (2010), held that the 90-day limit for ordering restitution under the Mandatory Victim Restitution Act, 18 U.S.C. §§ 3663A & 3664(d)(5), is not ironclad or jurisdictional. The decision permits a district judge to sentence a criminal defendant and later determine the precise amount of restitution. As a result, a district court may enter an initial judgment imposing sentence, including a nonspecific award of restitution, and later amend the sentence to specify the details of the restitution award,[1] even if the original judgment and sentence is already on appeal. The Court characterized the amendment as "essentially fill[ing] in an amount-related blank in a judgment that made clear that restitution was 'applicable.'" 560 U.S. at 620. The Court recognized its decision might affect appellate review of the judgments, but "le[ft] all such matters for another day." 560 U.S. at 618. One open question about appellate review is whether a single notice of appeal perfects an appeal of both the original judgment, as well as the amended judgment specifying the amount of restitution, if the amendment is entered

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[1] Restitution is imposed by the sentence. *See* 18 U.S.C. §§ 3556 and 3664(o).

during the ongoing direct appeal of the initial judgment.

Three of four circuits answer the question in the affirmative, holding that a single notice of appeal perfects appeal of both the initial judgment and later-filed amended judgment, absent prejudice to the government. *See United States v. Cheal*, 389 F.3d 35 (1st Cir. 2004) (holding premature notice of appeal filed after sentencing, but before restitution was ordered, was sufficient, where both parties fully briefed the restitution issue and there was no question of government surprise or prejudice); *United States v. Ryan*, 806 F.3d 691, 692 (2d Cir. 2015) (holding single notice of appeal filed as to judgment including sentencing covers later-filed amended judgment including restitution "because amended judgment supersedes the original judgment"); *United States v. Hyde*, 556 F. App'x 62, 63 n.1 (2d Cir. 2014) (holding that original notice of appeal of criminal judgment " 'ripened into an effective notice' of appeal from the amended judgment" designating restitution); *United States v. Stoian*, 2015 WL 5036366 (6th Cir. Aug. 12, 2015) (holding notice of appeal timely filed as to final judgment "spring[s] forward" to confer jurisdiction on deferred judgment regarding restitution) (relying on *United States v. Malcolm*, 114 F.3d 1190 (6th Cir. 1997) (table), 1997 WL 311416 *6 (holding premature notice of appeal in criminal case is valid and matures to cover later-filed judgment, absent prejudice to the government)).

Contrary to the decisions of those three circuits, the Eleventh Circuit has answered the question in the negative:

> We do not have jurisdiction to entertain Manrique's challenge to his restitution amount because he did not file a notice of appeal designating the amended judgment setting forth the restitution amount.

JA 85, 618 F. App'x at 583. This categorical jurisdictional holding is wrong. It incorrectly applies a jurisdictional bar based upon an alleged irregularity in complying with the Federal Rules of Appellate Procedure. And, it overlooks the proper operation of Fed. R. App. P. 4(b)(2), which allows a single notice of appeal to perfect an appeal of a deferred amended judgment that modifies the original sentence by "essentially fill[ing] in an amount-related blank in a judgment that made clear that restitution was 'applicable.'" *See* 560 U.S. at 620.

A. A single notice of appeal in a criminal case perfects the appeal of both the initial judgment and amended judgment specifying the amount of restitution.

A criminal appeal is perfected by the filing of a notice of appeal that is timely under Fed. R. App. P. 4. *See* Fed. R. App. P. 3(a)(1). Rule 4(b)(1)(A)(i) requires the notice to be filed "within 14 days after the later of

the entry of either the judgment or order being appealed. . . ." Rule 4(b)(2) activates a premature notice of appeal. Rule 4(b)(2) states:

> **Filing Before Entry of Judgment.** A notice of appeal filed after the court announces a decision, sentence, or order – but before the entry of the judgment or order – is treated as filed on the date of and after the entry.

The operative point of time referenced in both subsections of Rule 4(b) is entry of "the judgment." Under the deferred restitution process set forth in 18 U.S.C. §§ 3663A and 3664(d)(5), "the judgment" is a combination of the initial judgment and sentence (which includes a non-specific award of restitution), and the later-filed amended judgment specifying the details of restitution. This is due to the language of the statute's subsections and the interpretation this Court set forth in *Dolan*.

In a deferred restitution case under the Mandatory Victim Restitution Act, the district judge is required to order restitution at sentencing, *see* 18 U.S.C. §§ 3556 & 3663A(a)(1)&(c), but is permitted to defer entry of judgment on the specifics of restitution. *See* 18 U.S.C. § 3664(d)(5). To accomplish this, the district court announces at the sentencing hearing that restitution is mandatory (or words to that effect) and that the specifics of restitution will be entered in an amended judgment. *See, e.g., United States v. Cheal*, 389 F.3d 35, 46-47 (1st Cir. 2004) (announcing that defendant will pay restitution, reciting that fact in final judgment, but deferring restitution hearing, then

entering deferred amended judgment including restitution amount). A judgment is then entered reciting that announcement. An amended judgment is later entered, "essentially fill[ing] in an amount-related blank in a judgment that made clear that restitution was 'applicable.'" *Dolan*, 560 U.S. at 620.[2]

In a case of deferred restitution, "the judgment" referenced in Rule 4(b)(1)&(2) is a combination of both the initial judgment and the amended judgment, because they merge together into one. *See United States v. Ryan*, 806 F.3d at 692. In a very real sense, the first judgment is only a partial final judgment in that it acknowledges the announced restitution, but it leaves blank the specifics of restitution. The amended judgment fills in the blanks of restitution that the original judgment declared as applicable. Together, they are "the judgment" being appealed under Rule 4(b)(1)&(2). This may seem an unusual procedure for the entry of a final judgment, because, as a general rule a district court loses jurisdiction to alter the final judgment

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[2] Mr. Manrique's case followed this common path. The district judge pronounced sentence, including terms of imprisonment and lifetime supervised release, and also announced that "restitution is mandatory." A judgment was entered the next day, reciting the terms of imprisonment and supervised release, but deferring entry of the restitution portion of the sentence. He filed a timely notice of appeal of the judgment and sentence. After the dollar amount of restitution was determined, the district court entered a second judgment specifying that it amended the original judgment with a "Modification of Restitution Order." It was the same as the first judgment in all respects except it filled in the blanks left open in the restitution section of the judgment and sentence.

while the case is on appeal. But the two-step process of entering "the judgment" is a necessary consequence of the deferred restitution procedure set forth in § 3664(d)(5), as interpreted and applied in *Dolan*. Thus, a notice of appeal filed after sentencing (or even after the initial judgment) is filed "after the court announces a decision, sentence or order – but before the entry of the judgment" specified in Rule 4(b)(2). As a result, the notice of appeal matures and springs forward to perfect appeal of "the judgment," which by then includes the later-filed amended judgment specifying the amount of restitution.

Such a multi-step process for arriving at "the judgment" is recognized by the *Restatement (Second) of Judgments*, which addresses the finality of judgments as it relates to *res judicata* and appeal. Ordinarily, "[f]inality will be lacking if an issue of law or fact essential to the adjudication of the claim has been reserved for future determination, or if the court has decided that the plaintiff should have relief against the defendant of the claim but the amount of the damages, or the form or scope of other relief, remains to be determined." *Restatement (Second) of Judgments*, § 13, Requirement of Finality, comment *b* (1982) (June 2016 update). However, as the *Restatement* recognizes, finality can take on different meanings because "considerable liberties are being taken with finality in the context of appeal in order to take care of various exigent situations in which prompt review by the higher courts is thought necessary." *Id.*

The restitution procedure authorized by § 3664(d)(5) and the Court's decision in *Dolan* illustrate the *Restatement*'s comment about the impact of permitting appeals before the judgment reaches full finality. As part of his argument before the Court, Dolan contended that a sentencing judgment is not final until it contains a definitive determination of restitution. 560 U.S. at 616, 617. Rather than decide the finality question directly, the Court noted that the initial judgment could be final enough for purposes of appeal because "strong arguments favor the appealability of the initial judgment irrespective of the delay in determining the restitution amount." *Id.* The Court's decision permits an initial judgment to be appealed immediately to avoid the exigency of "forc[ing defendants] to wait three months before seeking review of their conviction when they ordinarily could do so within 14 days." 560 U.S. at 618. The first judgment – announcing restitution, but not specifying it – would be deemed final for appeal even though the *Restatement* would contend that it is not because it leaves blank the specifics of restitution.

Without holding that the initial judgment is "the" final judgment, *see* 560 U.S. at 617, the Court noted that the entry of this initial judgment can suffice to start the appeal process. This does not discount that the judgment is not final in the ordinary sense of finality of the case. Later, when the amended judgment fills in the blanks of restitution that the original judgment announced, the amended judgment merges into the

original judgment, and together, they form "the judgment" referred to in Rule 4(b)(1)&(2). Following entry of the amended judgment, the earlier-filed notice of appeal matures to embrace it.

As noted above, decisions in three of four circuits have expressly recognized court of appeals' jurisdiction over an amended judgment imposing restitution based on a premature notice of appeal. *See United States v. Cheal* (1st Cir.); *United States v. Ryan* (2d Cir.); *United States v. Hyde* (2d Cir.); *United States v. Stoian* (6th Cir.); *United States v. Malcolm* (6th Cir.). These circuit decisions are in accord with those of six other circuits, recognizing jurisdiction over criminal appeals, generally, even though perfected only by a premature notice that matured under Rule 4(b)(2).[3]

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[3] *See, e.g.*, *United States v. Andrews*, 681 F.3d 509, 516 n.2 (3rd Cir. 2012) (holding premature notice of appeal deemed filed as of date final judgment was later entered); *United States v. Thornton*, 1 F.3d 149, 157-58 (3rd Cir. 1991) (holding Court of Appeals had jurisdiction over appeals of post-trial motions, despite premature notice of appeal, because parties had fully briefed the issues without any claim of prejudice); *United States v. Bly*, 510 F.3d 453, 457 n.6 (4th Cir. 2007) (holding Court of Appeals had jurisdiction, despite premature notice of appeal, based on Rule 4(b)(2) because it "is deemed to be 'filed on the date of and after entry' "); *United States v. Winn*, 948 F.2d 145, 155 (5th Cir. 1991) (holding that, absent prejudice, Court of Appeals would hear challenges to both judgment and sentence despite premature notice of appeal); *United States v. Baker*, 559 F.3d 443, 447 n.2 (6th Cir. 2009) (holding Court of Appeals had jurisdiction over premature notice of appeal filed after sentencing, but before judgment entered); *United States v. Cantero*, 995 F.2d 1407, 1408 n.1 (7th Cir. 1993) (holding that Rule 4(b)(2) permits notice of appeal to be filed after sentencing, but before entry of final judgment); *United*

In the context of amended judgments imposing restitution, only the Eleventh Circuit in *Manrique* holds that it lacks jurisdiction in the case of a premature notice of appeal. Of note, in reaching its decision below the Eleventh Circuit expressly overruled its own prior precedent, which had also recognized jurisdiction in these circumstances. *See United States v. Kapelushnik*, 306 F.3d 1090 (11th Cir. 2002), abrogated by *Manrique*; *United States v. Quincoces*, 503 F. App'x 800, 802 (11th Cir. 2013) (holding that, where district court's restitution order was not final when timely notice of appeal was filed, it "ripened into an effective notice of appeal on the date the district court made its final restitution determination") (citing *Kapelushnik*). Notably, two of the decisions from other circuits – the Second and Sixth Circuit's decisions in *Hyde* and *Stoian* – expressly relied in part on the Eleventh Circuit's since-overruled precedent in *Kapelushnik*.

In its decision below, the Eleventh Circuit reversed course, holding that a single notice of appeal does not suffice to confer jurisdiction over the restitution issue. JA 85, 618 F. App'x at 583. The Eleventh Circuit explained that its reversal was driven by this Court's decision in *Dolan*. JA 83-85, 618 F. App'x at 582-83. Yet, the *Dolan* decision does not undercut the application of the premature notice provision of Rule 4(b)(2).

States v. Walker, 915 F.2d 1463, 1465 (10th Cir. 1990) (holding premature notice of appeal filed before sentencing ripens when judgment is formally finalized, conferring jurisdiction on Court of Appeals).

To be sure, the Eleventh Circuit's jurisdictional holding in *Manrique* is the outlier, at odds with every other circuit to have spoken on the question, its own prior circuit precedent, and modern federal rules of practice and procedure.

B. Applying Fed. R. App. P. 4(b)(2) to notices of appeal filed before entry of an amended judgment specifying the sentence of restitution conforms to the Federal Rules of Appellate Procedure.

Under the modern Federal Rules of Appellate Procedure, an appeal is perfected by the filing of a notice of appeal that is timely under Rule 4. *See* Fed. R. App. P 3(a)(1). The antiquated practice of assignment of errors was abolished as "obsolete" by the middle of the last century. Fed. R. App. P. 3(a), advisory committee's note (1967 Adoption). Rules of practice since then "requir[e] nothing other than the filing of the notice of appeal in the district court for the perfection of the appeal." *Id.* As in any appeal of a criminal judgment, the precise issues to be raised are not revealed until briefing. Although the spectrum of potential issues is vast – *e.g.*, adequacy of the charging document or plea, jury selection, admission or exclusion of evidence, jury instructions, sufficiency of evidence, argument, sentencing, fine, forfeiture and restitution – the issues raised in a given appeal are not denominated in advance of briefing, and there is certainly no requirement that a party designate errors any earlier. The portions of the judgment appealed and the questions raised are

first identified and fleshed out by the briefs. As a result, a notice of appeal that matures under Rule 4(b)(2) provides the same notice that the rules of practice contemplate.

The notice of appeal simply places the court of appeals and parties on notice that the final judgment in a criminal case is being appealed, allowing the court clerk to docket that action for further proceedings. The amended restitution judgment completes the final judgment. *See Ryan*, 806 F.3d at 692. Any requirement for a second notice of appeal during the pendency of the direct appeal begs for form over substance.

The rules governing criminal appeals are different from civil appeals. The rules governing civil appeals specifically contemplate that an amended notice of appeal will be filed after an amended judgment. *See* Fed. R. App. P. 4(a)(4)(B)(ii). Rule 4(a)(4)(B)(ii), applicable only to civil appeals, requires a civil appellant to file a second notice of appeal to challenge "a judgment's alteration or amendment." *Id.* In recognition that such additional notices are required, Rule 4(a)(4)(B)(iii) exempts the additional notices from multiple filing fees in civil cases. These provisions have no counterpart in the subsections of Rule 4 relating to criminal appeals. The requirement for multiple notices is absent from the rules governing criminal appeals, as is the fee exemption for such notices. The absence of parallel provisions for criminal appeals confirms that a second notice of appeal is not required for an amended criminal judgment entered during the pendency of an appeal of the initial judgment. *See United States v.*

Malcolm, 114 F.3d 1190. Relying on three published circuit decisions and a respected treatise on federal appellate procedure, *Malcolm* explained that several circuits have reasoned that the differing provisions for civil and criminal appeals imply that an appellant in a criminal case is under no duty to amend his notice of appeal, so long as the government is not prejudiced by the filing of only one. *Id.*, at *7, citing *United States v. Thornton*, 1 F.3d at 157-58 (3rd Cir.); *United States v. Winn*, 948 F.2d at 155 (5th Cir.); *United States v. Walker*, 915 F.2d at 1465 (10th Cir.); *see also*, 16A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure Jurisdiction* § 3950.11, 253-54 (2d ed. 1996).

Other subsections of Rule 4(b) address the deadlines for certain aspects of criminal appeals, but do not refer to the appeal of an "amended judgment" – much less to the amendment of a "sentence" that fills in an amount of "restitution." Fed. R. App. P. 4(b)(3) provides that if a motion for judgment of acquittal, new trial, or arrest of judgment is filed, the time for appeal runs from the entry of an order disposing of the motion or entry of the judgment, whichever period ends later. It does not mention or include amended judgments, or sentences, but rather addresses freestanding orders that are also appealable apart from the final judgment. Also, as to the three subject motions only, it clarifies the time limits for filing an appeal if one of the three subject motions is decided before the initial judgment is entered. *See* Fed. R. App. P. 4(b)(3) advisory committee's note (1993 amendment). Rule 4(b)(4) applies the

maturing notice rule to the orders disposing of the three subject motions, but is not implicated as to appeals of a final judgment. None of the remaining portions of Rule 4(b) bear on appeals of amended judgments specifying restitution.

On the other hand, applying Rule 4(b)(2)'s maturing notice provision to deferred restitution judgments is entirely consistent with the prevalence of electronic filing in federal courts, *see* Fed. R. App. P. 25(a)(2)(D), which has simplified the filing of amended judgments on the dockets of both the district courts and courts of appeals. Every district court and court of appeals utilizes electronic filing. *See* United States Courts, Judiciary News, "All Federal Courts Now Accepting Electronic Filing" (May 17, 2012) (available at http://www.uscourts.gov/news/2012/05/17/all-federal-courts-now-accepting-electronic-filing) (last viewed June 24, 2016). The universal implementation of Case Management/Electronic Case Files (CM/ECF) "provides courts enhanced and updated docket management. It allows courts to maintain case documents in electronic form." *Id.* Court clerks file amended judgments electronically, without the antiquated process of preparing volumes of a paper record or supplemental record. *See, e.g.*, JA 7 (DE 76) ("The entire record on appeal is available electronically."). Here, for example, the amended judgment was filed on the Court of Appeals' docket only five days after it was entered in the district court,

without any further designation or prompting by counsel. JA 9-10.[4]

The alternative interpretation now employed by the Eleventh Circuit is anything but pragmatic, and is replete with judicial inefficiencies inconsistent with the rules of practice. It requires a second notice of appeal and a costly duplicate filing fee.[5] For indigent defendants, like Mr. Manrique, the filing fee is waived, but the duplicated administrative cost associated with a second appeal is borne by the public fisc. The district court clerk must transmit the second notice to the clerk of the court of appeals, who dockets an additional case in the court of appeals, *see* Fed. R. App. P. 12(a), disconnected from the original. A process of consolidation may then occur, usually on motion of a party, *see* Fed. R. App. P. 3(b)(1), but until that occurs the two appeals remain separate, with independent schedules for filing transcripts, preparing the record, and for briefing. Any preliminary matters are addressed by separately assigned panels of the court of appeals, and if the cases are not consolidated, the court of appeals doubles the use of judicial resources, fragmenting the

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[4] The appellant has a continuing duty to ensure that the record includes all filings and transcripts necessary for the issues presented on appeal. *See* Fed. R. App. P. 10(b) & 11(a).

[5] As noted, the exemption from paying a second filing fee for notices filed following amended judgments in civil appeals, set forth in Fed. R. App. P. 4(a)(4)(B)(iii), does not apply to criminal appeals and has no corollary in the criminal subsections of Rule 4. It seems likely, however, that a corollary rule would exist if the drafters intended multiple notices of appeal in a single criminal appeal.

decision-making of the judgment imposing sentence, and the restitution aspects of what has become a single final judgment. Not only is this interpretation impractical and cumbersome, but it also creates for criminal appeals the kind of "notice trap" that once existed in civil appeals, but was rightly abolished by the appellate rules amendments promulgated in 1993.

The notice trap in civil cases was caused by a former rule of appellate procedure and the Court's interpretation of that rule. Prior to the 1993 amendments, Rule 4(b)(1) (civil appeals) provided that "[a] notice of appeal filed before the disposition of any of the [designated post-trial] motions shall have no effect." Fed. R. App. P. 4(a)(4) (1979). This Court had interpreted that provision in a civil case as making such a notice of appeal a "nullity, . . . as if no notice of appeal were filed at all." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982). The 1993 amendments to Rule 4 replaced the "nullity" rule in civil appeals with a rule that recognizes ripening of a premature notice of appeal. *See* Fed. R. App. P. 4(b)(2) advisory committee's note (1993 amendment). The Advisory Committee explained that the provision was written to eliminate the "trap" that previously occurred in a civil appeal if an unsuspecting litigant did not file a second notice of appeal in the event an amended judgment was entered while the appeal was pending under the original notice of appeal. *Id.* The rules were rewritten to be explicit about when an amended notice of appeal is required. As a result of the 1993 amendments, Fed. R. App. P.

4(a)(4)(B)(ii) now specifies precisely when a second notice of appeal is required in the case of an amended judgment in a civil case.

Although this eliminated the trap in civil cases, the trap never existed in criminal appeals. Yet, if Rule 4(b)(2)'s premature notice provision is not interpreted to cover amended restitution judgments, it creates a trap where there never has been one before. The rules governing criminal appeals are silent on the need to file a second or amended notice of appeal following an amended judgment that fills in the blanks of restitution previously awarded. Depending on the circuit in which a restitution appeal arises, and the timing of an amended judgment, any given appeal might require only a single notice, or it may require two, even though the amended judgment is entered during the direct appeal initiated by the original notice of appeal. The potential for confusion for the unsuspecting litigant, despite diligently following the written rules, recreates a trap of the kind the Court abolished when it adopted the Advisory Committee's redrafting over two decades ago.

C. Assuming, *arguendo*, that an irregularity occurred, dismissal was improper because the requirements for perfecting an appeal in federal criminal cases are not jurisdictional, but rather are governed by the substantial prejudice test of Fed. R. Crim. P. 52(a).

A federal criminal appeal is initiated by the filing of a timely notice of appeal under the limits set forth

in the Federal Rules of Appellate Procedure. Fed. R. App. P. 3(a)(1) and 4(a)(1) & (2). The time limits set by the rules for criminal cases are not jurisdictional. *Bowles v. Russell*, 551 U.S. 205, 212 (2007).

In *Bowles*, this Court distinguished between the time for filing an appeal in a civil case, which is based on a congressional statute, and appeals from criminal cases, which are based only on court rule. Statutory time limits in civil cases, the Court held, are jurisdictional, but the rule-based limits in criminal appeals are not: "We have treated the rule based time-limit for criminal cases differently, stating that it may be waived because '[t]he procedural rules adopted by the Court for the orderly transaction of its business are not jurisdictional and can be relaxed by the Court in the exercise of its discretion. . . .' *Schacht* [*v. United States*, 398 U.S. 58 (1970)] at 64." *Bowles*, 551 U.S. at 212; *see United States v. Lopez*, 562 F.3d 1309, 1312-13 (11th Cir. 2009) ("Because the deadline in Rule 4(b) for a defendant to file a notice of appeal in a criminal case is not grounded in a federal statute, we hold that it is not jurisdictional.") (citing *Bowles*).

Irregularities in perfecting criminal appeals are evaluated under Fed. R. Crim. P. 52(a), which requires that they be disregarded unless substantial rights are affected. *Lemke v. United States*, 346 U.S. 325 (1953) (per curiam). In *Lemke*, the Court considered the jurisdictional significance of Fed. R. Crim. P 37, the predecessor to Fed. R. App. P. 4(b)(2). Lemke filed his notice of appeal after sentencing, but three days before the judgment in a criminal case was entered. No notice of

appeal was filed after that time. In a divided decision, the Ninth Circuit Court of Appeals dismissed the appeal due to the premature notice of appeal. One judge dissented, concluding that "the notice of appeal, though premature, was not a nullity. I think the defect and irregularity here is of the sort we are required to disregard by Criminal Rule 52(a)." *Lemke v. United States*, 203 F.2d 406, 407 (9th Cir. 1953) (Pope, J., dissenting), *cert. granted, reversed and remanded*, 346 U.S. 325. Then, as now, Fed. R. Crim. P. 52(a) directed that "[a]ny error, defect, irregularity or variance that does not affect substantial rights must be disregarded."[6] This Court granted certiorari, reversed and remanded to the Ninth Circuit, noting that the notice of appeal was still on file when the judgment was entered, "and gave full notice after that date, as well as before, of the sentence and judgment which petitioner challenged." 346 U.S. 326. The Court held – consistent with the black letter of Rule 52(a) and Judge Pope's dissent – that the "irregularity is governed by Rule 52(a) which reads 'Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.'" 346 U.S. 326.

The Eleventh Circuit's conclusion that it lacked jurisdiction to entertain Mr. Manrique's challenge to his

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[6] Adopted in 1944, Rule 52(a) was a "restatement of existing law, 28 U.S.C. former § 391 (second sentence)" which required an appeal to be decided "after an examination of the entire record before the court, without regard for technical errors, defects, or exceptions which do not affect the substantial rights of the parties." Fed. R. Crim. P. 52(a) advisory committee's note (1944 Adoption).

restitution amount, due to alleged noncompliance with a rule of appellate procedure, misapplied principles of jurisdiction in place of the substantial-rights test. To the extent the Eleventh Circuit's decision rests on jurisdiction, its holding is indefensible.

Lemke holds a court of appeals has jurisdiction over a premature notice of appeal. An alleged irregularity does not cause a jurisdictional deficit, but rather it raises a question whether substantial rights have been affected under Fed. R. Crim. P. 52(a). *Id.*; *see Bowles*, 551 U.S. at 212 (time-based procedural rules in criminal cases "can be relaxed by the Court in the exercise of its discretion") (quoting *Schacht*). As in the typical deferred restitution appeal, the notice of appeal in this case captured restitution both in the first instance, and as amended with a specific dollar amount. The events below demonstrate that the absence of a second notice of appeal in the same appellate case did not affect the government's substantial rights one whit.

In his oral pronouncement of sentence, the district judge specifically announced that restitution was mandatory. Those words included restitution in the sentence from the very first. The written judgment then incorporated the oral pronouncement including restitution, but noted that the amount of restitution would be decided at a future date, followed by an amended judgment to reflect this. Both the oral pronouncement and the original written judgment ordered restitution (albeit sans specifics) and the written judgment spoke to the fact that a more specific amended judgment

would be entered. Thus, when the defendant filed a timely notice of appeal as to the first judgment, it followed both the oral pronouncement that restitution is mandatory and the written judgment that the precise amount would be designated in an amended judgment. The amended judgment specifically connects to the restitution left open in the initial judgment, reciting that it amends the initial judgment by "Modification of the Restitution Order." JA 66. As in *Dolan*, the sentencing judge "essentially fill[ed] in an amount-related blank in a judgment that made clear that restitution was 'applicable.'" 560 U.S. at 620. Thus, the original notice of appeal captured that portion of the judgment involving restitution and the language in that original judgment relating to a future amended judgment. *See United States v. Cheal*, 389 F.3d at 46-47, 53 (holding that where sentencing judge announced, "[y]ou shall pay restitution," but written judgment deferred restitution award, single notice of appeal from original judgment gave Court of Appeals jurisdiction to hear appeal of amended restitution judgment); *United States v. Ryan* (same); *United States v. Hyde* (same); *United States v. Stoian* (same).

The notice of appeal enveloped the original judgment and it ripened automatically under Rule 4(b)(2) to include the amended judgment mentioned in the original judgment, once the amended judgment was entered. All parties and the clerk of the Court of Appeals understood this. All transcripts, orders and briefs were filed in the single appellate case, and both parties

fully briefed the restitution issue, without misunderstanding. The government alleged no prejudice and suffered none.

Experience following the *Dolan* decision has taught that the possibility of prejudice resulting from a single notice of appeal is remote, so remote that it has yet to occur in a reported decision. Indeed, post-*Dolan* restitution appeals have been uniformly decided by a single panel of appellate judges in a single opinion, without prejudice to any party.[7] This should come as no surprise since that likelihood was predicted by the Solicitor General's brief in *Dolan* based upon a statistical analysis of the median duration of criminal appeals in federal court. *See Dolan v. United States*, 2010 WL 1220084 (U.S.) (Appellate Brief) Supreme Court of

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[7] A survey of post-*Dolan* restitution appeals reveals that each was decided in a single opinion by a single panel, without any mention of prejudice, regardless of the underlying charges, or the timing of the restitution judgment or notice of appeal: *United States v. Ryan*, 806 F.3d 691 (2d Cir. 2015); *United States v. Messina*, 806 F.3d 55 (2d Cir. 2015); *United States v. Bour*, 804 F.3d 880 (2d Cir. 2015); *United States v. Scalzo*, 764 F.3d 739 (7th Cir. 2014); *United States v. Rodriguez*, 751 F.3d 1244 (11th Cir. 2014); *United States v. Ocasio*, 750 F.3d 399 (4th Cir. 2014), *aff'd*, ___ U.S. ___, 136 S. Ct. ___ (2016); *United States v. Battles*, 745 F.3d 436 (10th Cir. 2014); *United States v. Walsh*, 723 F.3d 802 (7th Cir. 2013); *United States v. Chaika*, 695 F.3d 741 (8th Cir. 2012); *United States v. Aumais*, 656 F.3d 147 (2d Cir. 2011); *United States v. Viola*, 555 F. App'x 57 (2d Cir. 2014); *United States v. Healy*, 553 F. App'x 560 (6th Cir. 2014); *United States v. Beckford*, 545 F. App'x 12 (2d Cir. 2013); *United States v. Hagerman*, 506 F. App'x 14 (2d Cir. 2012); *United States v. Abdelbary*, 496 F. App'x 273 (4th Cir. 2012); *United States v. Edkins*, 421 F. App'x 511 (6th Cir. 2010); *United States v. Riolo*, 398 F. App'x 568 (11th Cir. 2010).

the United States (Mar. 26, 2010). Responding to Mr. Dolan's contention that deferred restitution judgments under 18 U.S.C. § 3664(d)(5) would likely create piecemeal and multiple appeals, the government rejected that concern based upon real-world experience about the length of criminal appeals:

> [I]n the majority of cases in which the court does invoke that provision, it can be expected to comply with the law and issue an amended judgment setting forth a "final determination of the victim's losses" within 90 days of sentencing. Federal appellate courts currently take more than a year, on average, to resolve a criminal appeal. *See* Administrative Office of the U.S. Courts, Judicial Business of the United States Courts: 2008 Annual Report of the Director 107 (2009).

Dolan Br. 25. The most recent Annual Report continues to support the government's prediction. *See* Administrative Office of the U.S. Courts, Judicial Business of the United States Courts: 2015 Annual Report of the Director 107 (2015) (average time to resolve criminal appeal is 10.6 months). And, post-*Dolan* experience has proved this premise in the real world.

The reason the courts of appeals have discerned no prejudice from a single maturing notice of appeal is that the rules of practice and procedure easily accommodate any circumstance in which the government might otherwise suffer substantial prejudice. Indeed, it is difficult to imagine circumstances in which the government might suffer substantial prejudice from a

premature notice of appeal of a deferred amended restitution judgment. Only two possibilities come to mind, but in either event the potential for prejudice is avoided by existing appellate rules and practice.

First, the government might only decide to cross-appeal when the amended judgment is entered, if restitution is not awarded as requested. Arguably, its time to cross-appeal will have expired by that time because its due date is based on the filing of the original notice of appeal. Should this occur, the government does not lose its right to cross-appeal since either party may appeal the amended restitution judgment separately. *See Gonzalez v. United States*, 792 F.3d 232, 237 (2d Cir. 2015) (holding that there are "two opportunities to appeal: from an initial sentence, even if some aspects of the sentence are not final; and from the final order disposing of the case in the district court"), followed in *United States v. Ryan*, 806 F.3d 691, 692 n.1. In such event, the government's time for filing a cross-appeal renews upon entry of the amended judgment, so it does not suffer any prejudice.

Secondly, the amended restitution judgment might be filed after all briefing has transpired in the court of appeals, preventing the government from making a fulsome argument on the restitution question. The rules of practice allow, and practical experience demonstrates, that briefing of the issues can be held in abeyance until the amended judgment is filed. *See, e.g.*, *United States v. Ryan*, 806 F.3d 691 (accepting single notice of appeal timely filed following 2011 judgment to perfect appeal of 2015 amended judgment detailing

restitution; holding appeal in abeyance awaiting the amended judgment); *United States v. Bour*, 804 F.3d 880 (resolving in single appeal both the original judgment and amended judgment including restitution entered 235 days later); *United States v. Rodriguez*, 751 F.3d 1244, 1260 (staying appeal of April 2012 judgment for over two years until amended judgment including restitution was filed after a June 2014 hearing). If, on the other hand, the parties or court of appeals seek an expeditious resolution of the appeal of the judgment and sentence, such that briefing and argument occur before the amended judgment is entered, a separate appeal is optionally available to either party by filing a notice of appeal from the deferred amended restitution judgment. *See Gonzalez*, 792 F.3d at 237 and *Ryan*, 806 F.3d at 692 n.1.

The absence of a second notice of appeal caused no prejudice in the present case and it seems virtually impossible to impact any deferred restitution appeal. A single maturing notice of appeal fits comfortably within the federal rules of procedure and practice.

* * *

Rule 4(b)(2) allows a single notice of appeal to perfect an appeal of both the initial judgment imposing sentence (including restitution, generally), as well as an amended judgment specifying the amount of restitution. This reading of the rule comports with the Court's precedents, the rules governing criminal appeals, the *Restatement (Second) of Judgments*, and is in accord with the established practices of the courts

of appeals. The Eleventh Circuit's categorical refusal to entertain an appeal of the restitution amount in Mr. Manrique's sentence resulted from a fundamental misunderstanding of its jurisdiction, the rules governing criminal appeals, and the proper analytical framework applicable if a court suspects that there has been an irregularity in perfecting an appeal.

CONCLUSION

Based upon the foregoing argument and citations of authority, the Court should reverse the categorical conclusion of the Eleventh Circuit that it lacked jurisdiction over the restitution issue on appeal, and remand the case for a ruling on the merits of the restitution issues.

Respectfully submitted,

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No. 15-7250

In the Supreme Court of the United States

MARCELO MANRIQUE, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a notice of appeal from a sentencing judgment that defers restitution is effective to challenge a later-issued restitution award.

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OPINION BELOW

The opinion of the court of appeals (J.A. 78-85) is not published in the *Federal Reporter* but is reprinted at 618 Fed. Appx. 579.

JURISDICTION

The judgment of the court of appeals was entered on July 15, 2015. A petition for rehearing was denied on September 11, 2015 (J.A. 86-87). The petition for a writ of certiorari was filed on December 2, 2015, and the petition was granted on April 25, 2016. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

The pertinent statutory provisions and rules are reproduced in the appendix to this brief. App., *infra*, 1a-17a.

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Florida, petitioner was convicted on one count of possessing a visual depiction of a minor engaging in sexually explicit conduct, in violation of 18 U.S.C. 2252(a)(4)(B) and (b)(2). J.A. 31. The district court entered a judgment sentencing petitioner to 72 months of imprisonment and a life term of supervised release. J.A. 32-33. Following a restitution hearing, J.A. 45, the court issued an amended judgment ordering restitution in the amount of $4500. J.A. 74. The court of appeals affirmed the original judgment and dismissed for lack of jurisdiction petitioner's challenge to restitution. J.A. 78-85.

1. In January 2014, a child pornography investigation led federal agents to petitioner's residence in Miami, Florida. Petitioner admitted to downloading child pornography onto his desktop computer. Petitioner consented to a search of his computer, which revealed more than 300 files containing visual depictions of children engaged in sexually explicit conduct. J.A. 22-23; see J.A. 18 (videos involving children who appeared to be less than six years old).

a. Petitioner pleaded guilty to one count of possessing a visual depiction of a minor engaging in sexually explicit conduct. J.A. 78-79. At a sentencing hearing conducted on June 23, 2014, the district court imposed a 72-month term of imprisonment and a life term of supervised release. It also ordered petitioner to pay a special assessment of $100. J.A. 26-28. The court acknowledged that restitution was "mandatory" but stated that the victims' losses had not yet been ascertained; it accordingly scheduled a hearing, to be

held in two months' time, at which the victims' losses would be determined. J.A. 27.

The district court's judgment was entered on the docket the next day, June 24, 2014. J.A. 4. The judgment memorialized the imprisonment, supervised release, and special assessment aspects of petitioner's sentence, J.A. 31-41, but listed the amount of restitution as "$0.00," J.A. 39. It also stated that the "determination of restitution [wa]s deferred" and that an amended judgment would be entered "after such determination." *Ibid.*

On July 8, 2014, petitioner filed a notice of appeal "from the final judgment and sentence entered in this action on the 24th day of June, 2014." J.A. 42. Also on July 8, the district court transmitted the notice of appeal and docket sheet to the court of appeals. J.A. 4-5. The next day, the court of appeals acknowledged receipt of the notice of appeal, and petitioner's appeal was given an appellate case number. J.A. 5.

b. The district court held petitioner's restitution hearing, after rescheduling, on September 17, 2014. J.A. 5-6. The prosecutor informed the court that only one of the victims, known by the pseudonym "Angela," sought restitution. J.A. 48. Petitioner had possessed 45 images of Angela, some of which depicted her at three or four years old being forced to perform oral sex on her father. J.A. 49, 58, 60. Angela's attorney submitted materials under seal—including a letter, affidavit, psychological evaluation, and victim impact statement—explaining the physical and mental trauma that Angela had endured, both from the initial abuse and from the later distribution of the images. J.A. 48-50, 55, 59-60; see J.A. 52 (psychological evaluation explaining that "the fact that these images are

out there is continuing to harm her"). The materials also described her associated treatment and legal costs, including "detailed accounts of what [Angela] is going to need to pay over the course of her life to overcome what happened." J.A. 59; see J.A. 50, 53-55, 59-60. Angela sought $11,980 to $16,400 in restitution to compensate for damage that petitioner's actions had "proximate[ly] cause[d]." J.A. 49.

In response, petitioner argued that Angela was entitled to "Zero" based on the government's failure to prove a causal relationship between his conduct and the harm to Angela. J.A. 54. The district court rejected that argument. The court acknowledged the difficulty of "comput[ing] what the compensation should be" but believed it appropriate to use "God-given common sense." J.A. 58. Relying on evidence that the cost of Angela's treatment ranged from $85 to $200 per therapy session, the court concluded that restitution in the amount of $100 per image was "reasonable." J.A. 62; see J.A. 60-62. Based on the 45 images of Angela on petitioner's computer, the court orally ordered petitioner to pay Angela $4500 in restitution. J.A. 62. The court then asked petitioner if he wished to make a statement but cautioned petitioner to be careful in what he said because "your attorney * * * may or may not appeal this." *Ibid.*

On September 18, 2014, the day after the hearing, the district court entered an amended judgment, which added the order of restitution to petitioner's original sentence. J.A. 66-77. The amended judgment required petitioner to pay $4500 in restitution and specified the manner in which payments were to be made. J.A. 74-75. Petitioner did not file a notice of

appeal from the court's oral order imposing restitution, nor from the amended judgment.

2. On appeal, petitioner challenged his life term of supervised release and the restitution order. J.A. 78. As to restitution, petitioner argued that the government had not shown that he was the proximate cause of Angela's damages and had not substantiated the amount of damages. Pet. C.A. Br. 23-29. In response, the government argued that petitioner had waived his right to challenge restitution by failing to file a notice of appeal from the district court's oral ruling or from the amended judgment. Gov't C.A. Br. 22-25. The government also argued that the restitution order was proper. *Id.* at 25-32.

The court of appeals affirmed petitioner's life term of supervised release and dismissed his challenge to restitution. J.A. 78-85. The court described "the filing of a timely notice of appeal" from a district court decision as necessary to confer appellate "jurisdiction to review the decision on the merits." J.A. 83. Accordingly, "because [petitioner] did not file a notice of appeal designating the amended judgment setting forth the restitution amount," the court of appeals explained, "[w]e do not have jurisdiction to entertain [his] challenge to his restitution amount." J.A. 85. The court also rejected petitioner's argument that his notice of appeal from the original sentence had "ripened following the entry of the amended judgment." *Ibid.* In order to challenge the restitution order, the court stated, petitioner "was required to either appeal both the original judgment and the amended judgment, or appeal the amended judgment only." *Ibid.* Since petitioner had done neither, the court dismissed

"for lack of jurisdiction" petitioner's challenge to restitution. *Ibid.*

SUMMARY OF ARGUMENT

A criminal defendant may obtain appellate review of his sentence only by filing a notice of appeal after the sentence has been imposed. Petitioner failed to notice an appeal from the district court's award of restitution, and contrary to petitioner's argument, the Federal Rules do not legitimize or excuse that failure.

A. Congress gave the courts of appeals limited jurisdiction to review the sentence of a defendant who "file[s] a notice of appeal in the district court for review of * * * the sentence." 18 U.S.C. 3742(a); see Fed. R. App. P. 3(a)(1) (appellate review may be obtained "only by filing a notice of appeal"). Petitioner did not file a notice of appeal following the district court's award of restitution in September 2014 and so may not challenge the amount of restitution on appeal. Although petitioner did file a notice of appeal in July, following the original judgment imposed by the court, that judgment deferred restitution for resolution at a later date. See J.A. 39 ("determination of restitution is deferred"). Accordingly, petitioner's appeal from the original judgment was not effective to challenge the court's later award of restitution.

B. Petitioner's primary argument (Br. 22) is that, under Federal Rule of Appellate Procedure 4(b)(2), his prematurely filed notice of appeal "mature[d] and spr[ang] forward" following the district court's later award of restitution. That argument contradicts the text of Rule 4(b)(2), which applies only where a notice of appeal is filed "*after* the court announces a decision, sentence, or order" that the defendant wishes to appeal, but before the decision is formally entered on the

docket. But petitioner's notice of appeal was filed more than two months *before* the district court awarded $4500 in restitution, which is the decision he wishes to challenge on appeal.

Petitioner's argument also contravenes the purpose of Rule 4(b)(2), which protects a defendant who reasonably but mistakenly believes that the announcement of a decision is itself a final, appealable judgment. The judgment from which petitioner noticed his appeal listed the amount of restitution as "$0.00" and stated that the issue of restitution was "deferred." J.A. 39. A reasonable defendant would not interpret that as a final, appealable judgment with respect to restitution; nor would petitioner have had grounds at that time to object to the as-yet-undetermined *amount* of restitution. Petitioner's interpretation of Rule 4(b)(2) would also create practical and conceptual difficulties in some deferred-restitution cases and could interfere with the government's opportunity to cross-appeal in other cases.

C. In the alternative, petitioner argues that his failure to file a notice of appeal should be forgiven as "harmless error" under Federal Rule of Criminal Procedure 52(a) unless the government can prove prejudice. But that rule allows a court of appeals to excuse an "error" in the district court proceedings. It does not apply where, as here, a litigant simply fails to take the steps necessary to create appellate jurisdiction. Finally, even if the notice of appeal requirement were merely a mandatory-claim-processing rule—rather than a jurisdictional prerequisite to appellate review—the requirement must be given effect in this case because the government properly invoked it in the court of appeals.

ARGUMENT

THE COURT OF APPEALS LACKED JURISDICTION TO REVIEW THE DISTRICT COURT'S AWARD OF RESTITUTION BECAUSE PETITIONER FAILED TO FILE A NOTICE OF APPEAL FROM THAT DECISION

A. To Appeal A Criminal Sentence, The Defendant Must File A Notice Of Appeal Following The Order Or Judgment Sought To Be Appealed

"The right of appeal, as we presently know it in criminal cases, is purely a creature of statute." *Abney* v. *United States*, 431 U.S. 651, 656 (1977). Congress has specified the appropriate—and only—means for a defendant to appeal a criminal sentence: The defendant must "file a notice of appeal in the district court for review of * * * the sentence." 18 U.S.C. 3742(a). Because petitioner failed to file a notice of appeal following the district court's award of restitution, he may not challenge restitution on appeal.

1. Federal sentencing appeals have, historically, been strictly circumscribed. Before the Sentencing Guidelines system, a district court would exercise its discretion to choose a criminal sentence within statutory limits; once it did so, that sentence "was, for all practical purposes, not reviewable on appeal." *Koon* v. *United States*, 518 U.S. 81, 96 (1996). In 1984, Congress revised its approach to appellate review of sentencing by creating appellate jurisdiction "for review of an otherwise final sentence" in specified circumstances. Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, ch. II, § 213(a), 98 Stat. 2011. The current provision, Section 3742, now provides "limited appellate jurisdiction to review federal sentences." *Koon*, 518 U.S. at 96; see *United States* v. *Ruiz*, 536 U.S. 622, 628 (2002) (Section 3742 describes

the circumstances in which "appellate jurisdiction [i]s proper").

Section 3742 specifies both the categories of sentencing errors that may be appealed and the means by which appellate review may be obtained. As relevant here, a criminal defendant who seeks "review of an otherwise final sentence [that] was imposed in violation of law" must "file a notice of appeal in the district court." 18 U.S.C. 3742(a)(1). The Federal Rules impose a similar requirement, providing that a timely notice of appeal is the "only" route by which "[a]n appeal permitted by law as of right from a district court to a court of appeals may be taken." Fed. R. App. P 3(a)(1). Once filed, the notice of appeal "confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs* v. *Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) (per curiam). It also triggers many of the procedural steps that facilitate appellate review, including service of the notice on opposing counsel and on the defendant, Fed. R. App. P. 3(d); payment of any appellate docketing fees, Fed. R. App. P. 3(e); compilation of the record on appeal, see Fed. R. App. P. 10(a), (b)(1), and (3); and docketing of the case in the court of appeals, see Fed. R. App. P. 12(a).

In specifying that a criminal sentence may be challenged only through the filing of a notice of appeal, Section 3742 and the Federal Rules reflect an "unwritten but longstanding" legal principle: that "an appellate court may not alter a judgment to benefit a nonappealing party." *Greenlaw* v. *United States*, 554 U.S. 237, 244 (2008). That principle, which dates from the earliest days of the federal judiciary, see *McDonough*

v. *Dannery*, 3 U.S. (3 Dall.) 188, 198 (1796), serves "the interests of the parties and the legal system in fair notice and finality." *Greenlaw*, 554 U.S. at 252. This Court has accordingly declined on numerous occasions to permit "an appeals court [to] modify a judgment in favor of a party who filed no notice of appeal." *Id.* at 253; see, *e.g.*, *El Paso Natural Gas Co.* v. *Neztsosie*, 526 U.S. 473, 479 (1999); *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312, 314-318 (1988); see also *Greenlaw*, 554 U.S. at 245 (calling the rule "inveterate and certain" when applied to cross-appeals, but reserving judgment as to whether the rule is jurisdictional in that context) (citation omitted); cf. *Bolles* v. *Outing Co.*, 175 U.S. 262, 268 (1899) (litigant "did not take out a writ of error, and cannot now be heard to complain of any adverse rulings in the court below").

To be effective, a notice of appeal must be filed *after* the sentence intended to be appealed, not before it. That commonsense rule follows directly from Section 3742, which authorizes the defendant to file a notice of appeal to challenge a sentence that "*was imposed* in violation of law." 18 U.S.C. 3742(a)(1) (emphasis added); see *Carr* v. *United States*, 560 U.S. 438, 447-448 (2010) (ascribing "significance" to Congress's choice of verb tense). The Federal Rule that specifies the content of the notice of appeal also requires the appealing party to "designate the judgment, order, or part thereof being appealed," Fed. R. App. P. 3(c)(1)(B), a requirement that logically cannot be satisfied until the district court has issued the judgment or order sought to be appealed. And the deadline for a defendant to file a notice of appeal in a criminal case is "within 14 days *after*" the district court's "entry of either the judgment or the order

being appealed." Fed. R. App. P. 4(b)(1)(A)(i) (emphasis added). Putting the horse (the sentence) before the cart (the notice of appeal) helps prevent unnecessary and frivolous appeals: A defendant must know his sentence before he can evaluate the potential risks and benefits of appealing it—indeed, before he can determine whether a valid legal basis for appeal even exists.

2. The Mandatory Victims Restitution Act of 1996 (MVRA), Pub. L. No. 104-132, Tit. II, Subtit. A (§§ 201 *et seq.*), 110 Stat. 1227, specifies procedures for awarding restitution as a mandatory component of the sentence for certain criminal offenses, 18 U.S.C. 3663A, including offenses involving the sexual exploitation and abuse of children, 18 U.S.C. 2259(a). The MVRA requires prosecutors to identify victims and determine the amount of their losses before sentencing, 18 U.S.C. 3664(d)(1), but it also acknowledges that "the victim's losses [may] not [be] ascertainable" at that time. 18 U.S.C. 3664(d)(5). In those cases, "the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing." *Ibid.*

Where victims' losses are not ascertainable before sentencing, the district court will often issue an initial judgment that includes other aspects of the defendant's sentence (such as a term of imprisonment) but defers the issue of restitution for later resolution. Such a deferred-restitution scenario was presented in *Dolan* v. *United States*, 560 U.S. 605 (2010). There, the defendant was sentenced to terms of imprisonment and supervised release, but the issue of restitution was left "open" in light of "insufficient information on the record at th[at] time." *Id.* at 608 (cita-

tion omitted). The court accordingly entered an initial judgment that included the defendant's sentence, *ibid.*, but also scheduled a restitution hearing for a later date—albeit a date well past the 90-day deadline established by statute. *Id.* at 609. After the restitution hearing, the court imposed a new sentence that included an order of restitution. *Ibid.*

The question in *Dolan* was whether the district court's tardiness in holding the restitution hearing had affected its power to award restitution. In considering that question, this Court addressed the defendant's argument that a long time-gap between the initial judgment and the order of restitution might prejudicially "delay the defendant's ability to appeal" his prison sentence. 560 U.S. at 616. The Court disagreed, declining to accept the defendant's "premise, *i.e.*, that a sentencing judgment is not 'final'"—and hence, not appealable—"until it contains a definitive determination of the amount of restitution." *Id.* at 617. "To the contrary," the Court observed, "strong arguments favor the appealability of the initial judgment irrespective of the delay in determining the restitution amount." *Ibid.* The Court pointed to statutes indicating that a "judgment of conviction" that includes a sentence of imprisonment, supervised release, or a fine is a "final judgment," even if the amount of restitution has yet to be determined. *Id.* at 617-618 (quoting 18 U.S.C. 3582(b) (imprisonment) and citing 18 U.S.C. 3583(a) (supervised release) and 18 U.S.C. 3572(c) (fine)).

Particularly notable for present purposes, the Court also addressed what a defendant must do to appeal both the initial judgment and the later order of restitution:

> [Section] 3664(*o*) provides that a "sentence that imposes an order of restitution," such as the later restitution order here, "is a final judgment." Thus, it is not surprising to find instances where a defendant has appealed from the entry of a judgment containing an initial sentence that includes a term of imprisonment; that same defendant has subsequently appealed from a later order setting forth the final amount of restitution; and the Court of Appeals has consolidated the two appeals and decided them together.

Dolan, 560 U.S. at 618.

The discussion in *Dolan* strongly indicates the appropriate procedure for obtaining appellate review of the entire criminal sentence in a deferred-restitution scenario (although it did not definitively resolve the issue, see 560 U.S. at 618). An initial sentence that includes a term of imprisonment, supervised release, or a fine "is a 'final judgment,'" *id.* at 617 (quoting 18 U.S.C. 3582(b)), from which "the defendant can appeal" by filing a notice of appeal, *id.* at 618. Similarly, a later award of restitution "is a final judgment," from which the defendant may separately notice an appeal. *Ibid.* (quoting 18 U.S.C. 3664(*o*)). Therefore, if the defendant in a deferred-restitution case "has appealed from the entry of a judgment containing an initial sentence" but also wishes to appeal a later restitution order, that defendant should "subsequently appeal[] from [the] later order setting forth the final amount of restitution." *Ibid.* When the defendant does so, "the Court of Appeals [may] consoli-

date[] the two appeals and decide[] them together." *Ibid.*[1]

3. Petitioner did not follow that procedure. Although he appealed from the district court's initial judgment, entered on June 24, 2014, that judgment did not contain an order of restitution. Rather, it stated that "determination of restitution is deferred." J.A. 39. Petitioner then filed a notice of appeal that indicated his intent to appeal "from the final judgment and sentence entered in this action on the 24th day of June, 2014." J.A. 42. The sentence entered on that date was thus an "otherwise final sentence" that petitioner, by means of his notice of appeal, challenged on the ground that it "*was imposed* in violation of law." 18 U.S.C. 3742(a)(1) (emphasis added). Petitioner did not, however, appeal from the court's later oral order of $4500 of restitution, J.A. 62, nor did he appeal from the amended judgment that incorporated restitution in that amount into his sentence, J.A. 74-75. Because petitioner failed to do so, jurisdiction was never "confer[red] * * * on the court of appeals * * * over th[at] aspect[] of the case." *Griggs*, 459 U.S. at 58.

In response, petitioner notes (Br. 35) that the district court described restitution as "mandatory" at the original sentencing hearing, and he asserts (*ibid.*) that the court's statement had the effect of "includ[ing] restitution in the sentence from the very first." That

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[1] Following *Dolan*, every court of appeals to consider the issue has held that an initial judgment imposing a sentence but deferring determination of restitution is "final for purposes of appeal." *United States* v. *Muzio*, 757 F.3d 1243, 1250 n.8 (11th Cir.), cert. denied, 135 S. Ct. 395 (2014); see *United States* v. *Tulsiram*, 815 F.3d 114, 117-119 (2d Cir. 2016) (per curiam); *United States* v. *Gilbert*, 807 F.3d 1197, 1199-1200 (9th Cir. 2015).

is incorrect. At the sentencing hearing, the court accurately stated a general legal principle applicable to child pornography cases—that "restitution is mandatory," J.A. 27—but it did not award any restitution at that time. Petitioner similarly errs when he claims (Br. 36) that his "original notice of appeal captured that portion of the [initial] judgment involving restitution and the language in that original judgment relating to a future amended judgment." No "portion" of the initial judgment included restitution. See J.A. 39 ("$0.00"). To the contrary, the initial judgment, by stating that "determination of restitution is deferred," *ibid.*, indicated that the court was *declining* at that time to consider or resolve the proper amount of restitution.

This case also clearly illustrates the wisdom of requiring a notice of appeal to follow imposition of the sentence sought to be appealed. At the sentencing hearing, petitioner did not object to the district court's statement that restitution would be mandatory; indeed, he could not have objected, as he had just pleaded guilty to an offense for which restitution is required by statute. See 18 U.S.C. 2259(a) ("[T]he court shall order restitution for any offense under this chapter."). Thus, petitioner would have had no basis to challenge the court's statement as being "in violation of law," 18 U.S.C. 3742(a)(1), even if such a general statement were somehow appealable. Nor would petitioner have had grounds at that time to object to the *amount* of restitution, as no amount had yet been determined. It was only months later, after the restitution hearing at which the court concluded that petitioner was the proximate cause of $4500 of Angela's losses, that the concrete basis for possible appeal of

restitution emerged. Therefore, petitioner's "only" option for appealing the amount of restitution, Fed. R. App. P. 3(a)(1), was to file a notice of appeal after that amount had been determined.

B. Federal Rule Of Appellate Procedure 4(b)(2) Does Not Excuse Petitioner's Failure To Appeal From The Award Of Restitution

Petitioner acknowledges (Br. 20) that his notice of appeal from the district court's initial judgment was "premature" as a means of challenging restitution. He nevertheless argues (*ibid.*) that his notice of appeal was "activate[d]" under Federal Rule of Appellate Procedure 4(b)(2) when, more than two months later, the court ordered him to pay $4500 in restitution. But that rule, by its own plain text, applies in circumstances far different from this case.

1. Although criminal defendants must normally file a notice of appeal "within 14 days *after* * * * the entry of either the judgment or the order being appealed," Fed. R. App. P. 4(b)(1)(A)(i) (emphasis added), Rule 4(b)(2) creates a limited exception in the following scenario:

> A notice of appeal filed after the court announces a decision, sentence, or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

This exception recognizes that a district court's directives are not always formally noted on the docket immediately after they are announced. See Fed. R. App. P. 4(b)(6) (defining entry of a judgment or order to mean "when it is entered on the criminal docket"). If a defendant files a notice of appeal in the interim—*i.e.*, "after" the announcement of a decision but

"before" its formal entry on the docket—then the notice will be "treated as filed on the date of and after the entry."

That rule makes sense because, when a docket entry merely memorializes a decision that has already been announced, the entry is "only a ministerial act." *United States* v. *F. & M. Schaefer Brewing Co.*, 356 U.S. 227, 233 (1958); see *ibid.* ("[T]he clerk's notation in the civil docket * * * sets forth no more substance than is contained or directed in the opinion.") (internal quotation marks omitted). As this Court has explained in construing Rule 4(a)(2), the nearly identically worded civil counterpart to Rule 4(b)(2), this procedure "was intended to protect the unskilled litigant who files a notice of appeal from a decision that he reasonably but mistakenly believes to be a final judgment, while failing to file a notice of appeal from the actual final judgment." *FirsTier Mortg. Co.* v. *Investors Mortg. Ins. Co.*, 498 U.S. 269, 276 (1991). The rule applies "only when a district court announces a decision that *would be* appealable if immediately followed by the entry of judgment," because in that scenario, a litigant might "reasonably but mistakenly believe[the announcement] to be a final judgment," and "[l]ittle would be accomplished by prohibiting the court of appeals from reaching the merits of such an appeal." *Ibid.*

The circumstances under which Rule 4(b)(2) applies are illustrated by *Lemke* v. *United States*, 346 U.S. 325 (1953) (per curiam). There, the district judge pronounced the defendant's sentence on March 10, 1952, and the defendant filed a notice of appeal the next day. "The judgment, however, was not entered until March 14," and so the court of appeals dismissed

the defendant's appeal as premature. *Id.* at 326. This Court reversed. The Court acknowledged that the defendant had not complied with the then-applicable timeline for appealing but concluded that his error should be disregarded. *Ibid.* A new federal rule was adopted in 1966 to address the *Lemke* scenario, see Fed. R. Crim. P. 37, Notes of Advisory Committee on Rules (1966 amendment) (18 U.S.C. App. at 712 (Supp. II 1967)), and its language has now been incorporated into Rule 4(b)(2). See 16A Charles Alan Wright et al., *Federal Practice and Procedure* § 3950.11 (4th ed. 2008 & Supp. 2016) (Wright & Miller).

Rule 4(b)(2) offers petitioner no help, however. Petitioner filed his notice of appeal in July, more than two months *before* the district court "announce[d the] decision, sentence, or order" that he wished to appeal. During the interim, the court held a restitution hearing at which it heard evidence and argument and determined that petitioner should pay $4500 in restitution. That decision—the very decision petitioner seeks to appeal—can hardly be described as a "ministerial act," akin to entering a previously announced order onto the docket. Put another way, it "would *not* be reasonable" for a litigant to think that a district court's statement that it intends to address restitution in the future "is a final judgment" with respect to restitution. *FirsTier Mortg.*, 498 U.S. at 276; see *Dolan*, 560 U.S. at 617 (a judgment must "be freighted with sufficiently substantial indicia of finality to support an appeal") (citation and internal quotation marks omitted).[2]

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[2] Petitioner incorrectly asserts (Br. 23) that the Restatement of Judgments supports treating a judgment "announcing restitution, but not specifying it" as a final, appealable order. The provision he

2. Petitioner nevertheless offers a multi-step argument as to why Rule 4(b)(2) should apply to his notice of appeal.

- *First*, that the "operative point of time" referred to by the rule "is entry of the 'judgment.'" Pet. Br. 20.
- *Second*, that in a deferred-restitution scenario, "'the judgment' is a combination of the initial judgment and sentence * * * and the later-filed amended judgment." *Ibid.*
- *Third*, that "a notice of appeal filed after sentencing (or even after the initial judgment) is filed 'after the court announces a decision, sentence or order—but before the entry of the judgment' specified in Rule 4(b)(2). As a result, the notice of appeal matures and springs forward to perfect appeal of 'the judgment,' which by then includes the later-filed amended judgment specifying the amount of restitution." Pet. Br. 22 (quoting Rule 4(b)(2)).

Petitioner's argument fails at each step.

First, Rule 4(b)(2) does not refer to a single "operative point of time," but rather to two: (1) the point "after the court announces a decision, sentence, or order," and (2) the point "before the entry of the judgment or order." To benefit from Rule 4(b)(2), a defendant must file his notice of appeal in between

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cites, Restatement (Second) of Judgments § 13 cmt. b (1982), merely observes that "finality for appellate review is [not] the same as finality for purposes of res judicata," and it provides as an example an "interlocutory appeal * * * under 28 U.S.C. § 1292(b)." *Ibid.* Nothing in the Restatement supports petitioner's argument that a court, by deferring an issue for future resolution, has thereby rendered an appealable judgment.

those two points in time. But petitioner's notice of appeal was filed before the decision he wishes to appeal, not after.

Second, Rule 4(b)(2) does not contemplate compound judgments that span multiple court orders. Rather, the rule refers to "*the* judgment," which is a judgment that reflects "*a* decision, sentence, or order" sought to be appealed. In petitioner's case, the decision at issue is the district court's decision to impose $4500 in restitution, which was reflected only in the amended judgment that was entered in September, not the original judgment that was entered in June.

Third, petitioner's argument treats disparate decisions and judgments as interchangeable: He relies on a notice of appeal from the original sentencing decision (which did not include restitution) to stand in for an appeal of the amended judgment (which did). That is the only way petitioner can argue that his notice of appeal was filed after announcement of "a decision" but before "the judgment." But Rule 4(b)(2) does not allow a litigant to treat distinct orders as equivalent in that fashion. The "decision, sentence, or order" that precedes the notice of appeal must be reflected in *the same* "judgment" sought to be appealed. Petitioner thus cannot make his case fit within the rule's text.

3. A neighboring Federal Rule of Appellate Procedure confirms that Rule 4(b)(2) does not apply to the circumstances of this case.

Rule 4(b)(3) lists three post-trial motions: a motion for (i) judgment of acquittal, (ii) a new trial, or (iii) arrest of judgment. Fed. R. App. P. 4(b)(3)(A). Those are sometimes called "tolling motions" because, when a litigant timely files such a motion, it "suspends the running of the time to appeal" a conviction.

Wright & Miller § 3950.10 & n.2 (2008). Rule 4(b)(3)(C) addresses the effect of a tolling motion on the validity of a notice of appeal. The relevant scenario involves a criminal defendant who is convicted; files a notice of appeal; and then files one of the three tolling motions, which is ultimately denied. In that scenario, even though the notice of appeal comes before the tolling motion is filed or resolved, the rule allows the notice of appeal to apply both to the conviction and to denial of the motion:

> A valid notice of appeal is effective—without amendment—to appeal from an order disposing of any of the motions referred to in Rule 4(b)(3)(A).

Fed. R. App. P. 4(b)(3)(C). The rule thus specifies that, for a limited category of motions, a notice of appeal is effective "without amendment" as a means of appealing from a later-issued order disposing of those motions. The clear implication is that similar latitude is *not* allowed for other types of orders, such as a post-judgment order setting the amount of restitution.

Petitioner denies the relevance of Rule 4(b)(3)(C), asserting (Br. 28) that "[i]t does not mention or include amended judgments, or sentences, but rather addresses freestanding orders that are also appealable apart from the final judgment." Petitioner is wrong to suggest that the post-judgment *denial* of a tolling motion is more "freestanding" than the post-judgment *award* of restitution. Cf. *Dolan*, 560 U.S. at 618 ("[Section] 3664(*o*) provides that a 'sentence that imposes an order of restitution,' such as the later restitution order here, 'is a final judgment.'"). More fundamentally, petitioner misses the point of Rule 4(b)(3)(C), which is not about finality but about the effect of a notice of appeal. Normally, a notice of

appeal applies only to the orders and judgments that precede it. See pp. 10-11, *supra*. Rule 4(b)(3)(C) creates a limited exception for the three post-judgment tolling motions, deeming an earlier-filed notice "effective" to challenge their denial. But no similar rule relieves a defendant in a deferred-restitution scenario of the need to file a new notice of appeal if he wishes to obtain appellate review of a restitution order. In the absence of such an exception, the normal principle prevails: A new notice of appeal is required.[3]

4. Beyond the plain text of Rule 4(b)(2), the underlying logic of the relevant rules counsels against permitting a criminal defendant to challenge an order of restitution on appeal if he has failed to notice an appeal from that order.

a. Petitioner's reading of Rule 4(b)(2) would create practical and conceptual difficulties when a substantial delay occurs between the initial sentencing and the award of restitution. Although the MVRA requires district courts to determine the victims' losses within 90 days after sentencing, see 18 U.S.C. 3664(d)(5), this Court's ruling in *Dolan* means that courts retain the power to award restitution beyond that timeline.

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[3] Petitioner points (Br. 27-28) to Rule 4(a)(4), which addresses the effect of certain post-judgment tolling motions in civil cases. That rule largely mirrors the wording and operation of Rule 4(b)(3), albeit with some differences. For instance, whereas a notice of appeal is effective "without amendment" in the criminal context, Fed. R. App. P. 4(b)(3)(C), "an amended notice of appeal" is required in the civil context, Fed. R. App. P. 4(a)(4)(B)(ii), although the deadline for appeal is altered, *ibid.*, and the usual docketing fee is waived, Fed. R. App. P. 4(a)(4)(B)(iii). Thus, in both the civil and criminal context, special rules have been devised to deal with appeals from certain post-judgment orders—but no special rule applies to a post-judgment order imposing restitution.

Moreover, a "victim [who] subsequently discovers further losses" has 60 days to petition the court for an amended restitution order. *Ibid.* Accordingly, courts have awarded restitution several months—and sometimes several years—after sentencing.[4] The median resolution time for a federal criminal appeal is now approximately 8.5 months after the notice of appeal is

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[4] The United States has identified seventeen cases, decided since *Dolan*, involving a delay of more than one year between sentencing and the award of restitution. The longest intervals exceeded five years. See *United States* v. *Termini*, No. 10-cr-5, 2016 WL 199398, at *1 (D. Conn. Jan. 15, 2016) (more than five years), appeal filed, No. 16-261 (Jan. 27, 2016); *United States* v. *Henderson*, No. 07-cr-80(1), 2014 WL 347042, at *1-*2 (S.D. Ohio Jan. 30, 2014) (more than five years); *United States* v. *Bell*, 514 Fed. Appx. 423, 424 (5th Cir. 2013) (per curiam) ("about three years after the expiration of the 90-day period"); *United States* v. *Rodriguez*, 751 F.3d 1244, 1250-1251 (11th Cir.) (more than two years), cert. denied, 135 S. Ct. 310 (2014); *United States* v. *Pinto*, No. 12-cr-101, 2016 WL 308771, at *1 (D. Conn. Jan. 25, 2016) (more than two years); *Gilbert*, 807 F.3d at 1198 (twenty-two months); *United States* v. *Chipps*, No. 11-cr-50067, 2013 WL 4852254, at *1 (D.S.D. 2013) (twenty months); *United States* v. *Bourgeois*, No. 10-cr-025, 2013 WL 1953312, at *1 (D. Minn. May 10, 2013) (eighteen months); *United States* v. *Gushlak*, 728 F.3d 184, 188 (2d Cir. 2013) ("Nearly eighteen months"), cert. denied, 134 S. Ct. 1528 (2014); *United States* v. *Hymas*, 584 Fed. Appx. 361, 361 (9th Cir. 2014) ("Over 521 days later"); *United States* v. *Souffrant*, 517 Fed. Appx. 803, 806 (11th Cir. 2013) (per curiam) (sixteen months); *United States* v. *Qurashi*, 634 F.3d 699, 701 (2d Cir. 2011) (fourteen months); *United States* v. *Williams*, 946 F. Supp. 2d 112, 113-114 (D.D.C. 2013) (thirteen months), appeal filed, No. 13-3058 (June 21, 2013); *United States* v. *Michelson*, No. 09-cr-748-01, 2012 WL 1079626, at *1 (D.N.J. Mar. 30, 2012) (thirteen months), aff'd, 505 Fed. Appx. 156 (3d Cir. 2012); *United States* v. *Adejumo*, 777 F.3d 1017, 1018 (8th Cir. 2015) (twelve months); *United States* v. *Ottaviano*, 738 F.3d 586, 594 (3d Cir. 2013) (twelve months), cert. denied, 134 S. Ct. 1922 (2014).

filed. See Administrative Office of the U.S. Courts, *U.S. Courts of Appeals—Median Time Intervals in Months for Cases Terminated on the Merits, by Circuit, During the 12-Month Period Ending September 30, 2015*, Table B-4 (2015).[5] Thus, in a deferred-restitution case involving a long delay, if either party files a notice of appeal only from the initial sentencing decision, that appeal might well be resolved by the time restitution is ultimately ordered in the district court.

Under petitioner's reading of Rule 4(b)(2), in which a second notice of appeal is not required to challenge restitution, it is unclear what would or should happen next. Is the order of restitution automatically on appeal, even though the appeal from the original judgment has already been resolved? See Pet. Br. 36 (notice of appeal "ripen[s] automatically under Rule 4(b)(2) to include the amended judgment"). What if the defendant does not wish to appeal restitution?

The practical mechanics of the second appeal would also be uncertain, because a notice of appeal is the triggering event for many aspects of the appellate process. For instance, if a second notice of appeal is not filed, when, if ever, will the new appeal be docketed? See Fed. R. App. P. 12(a) (appellate docketing occurs "[u]pon receiving the copy of the notice of appeal and docket entries from the district clerk"). Will the government become aware that the second appeal exists before the defendant's opening appellate brief is filed? See Fed. R. App. P. 3(d)(1) ("The district clerk must serve notice of the filing of a notice of appeal by mailing a copy to each party's counsel of rec-

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[5] http://www.uscourts.gov/file/19492/download.

ord"); see also Fed. R. App. P. 12(b) (appealing attorney must file statement of representation "within 14 days after filing the notice [of appeal]").

Under the government's approach, by contrast, the process is straightforward: If either party wishes to challenge a later-issued restitution order, that party must file a notice of appeal, which would lead to a separate appellate proceeding. The normal approach is to consolidate the two appeals and decide them together, see *Dolan*, 560 U.S. at 618, and that approach might not be available if the delay between sentencing and restitution is too substantial. But no conceptual or practical difficulty would exist in adjudicating the restitution appeal.

b. Petitioner's reading of Rule 4(b)(2) might also interfere with the government's opportunity to cross-appeal certain restitution awards. In a criminal case, the government must file a notice of appeal within 30 days of "(i) the entry of the judgment or order being appealed; or (ii) the filing of a notice of appeal by any defendant," whichever occurs later. Fed. R. App. P 4(b)(1)(B). The latter deadline enables the government to consider its appellate options after reviewing both the underlying order and any appeal by the defendant. The deadline might come into play in a deferred-resolution scenario, for instance, if the government believes that a restitution award is too low but nevertheless declines to challenge it on appeal—unless the defendant does so first, in which case the government would consider a cross-appeal.

But if the defendant does not have to file a second notice of appeal, the government may not learn of the defendant's intention to challenge restitution on appeal until the defendant files his appellate brief. By

that point, the government's deadline for filing its own notice of appeal likely will have expired. See Fed. R. App. P. 31(a)(1) (appellant's opening brief is due "within 40 days after the record is filed"); see also J.A. 10 (petitioner's opening brief was filed 90 days after restitution was ordered). Although cross-appeals from restitution orders are not common, no reason exists to construe the Federal Rules so as to hinder the government's decision whether to pursue one. See *Greenlaw*, 554 U.S. at 246 ("Congress [has] entrusted to named high-ranking officials within the Department of Justice responsibility for determining whether the Government, on behalf of the public, should seek a sentence higher than the one imposed."). Petitioner's reading of Rule 4(b)(2) would have that effect in at least some circumstances.[6]

c. Petitioner offers two practical reasons to adopt his interpretation of Rule 4(b)(2), neither of which is persuasive.

First, he notes (Br. 30) that the government's approach would require a "second notice of appeal and a costly duplicate filing fee," though he acknowledges (*ibid.*) that "the filing fee is waived" for indigent

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[6] For the same reasons, petitioner's approach could deprive a criminal defendant of the opportunity to cross-appeal a restitution award in some deferred-restitution cases. If the government has appealed the initial sentence, but does not file a second notice of appeal following a later-issued restitution award, the defendant may not learn of the government's intention to challenge restitution until the defendant's deadline for filing a cross-appeal has lapsed. See Fed. R. App. P. 4(b)(1)(A)(ii) (defendant must cross-appeal within 14 days after government's notice of appeal). That scenario will presumably occur less frequently, but the possibility that it could happen underscores the incongruity of petitioner's approach.

defendants like himself. He further argues (Br. 30-31) that a second notice of appeal would require taking some procedural steps twice, including transmittal of the notice to the court of appeals and docketing of the appeal, a duplicative process that he calls "impractical and cumbersome."

But much of "modern appellate practice," which the filing of a notice of appeal automatically sets in motion, relies on "electronic filing and dockets," Pet. Br. 14, thus limiting any administrative burdens from the second appeal. And when two appeals arise out of the same criminal case, typically the courts of appeals have "consolidated the two appeals and decided them together." *Dolan*, 560 U.S. at 618. Indeed, petitioner himself asserts (Br. 37) that "post-*Dolan* restitution appeals have been uniformly decided by a single panel of appellate judges in a single opinion, without prejudice to any party." He offers (Br. 37 n.7) a list of citations, which includes appeals from circuits (including the Eleventh Circuit) that require a second notice of appeal in a deferred-restitution case. Accordingly, experience does not suggest that the government's reading of Rule 4(b)(2) would be unduly burdensome or wasteful.

Second, petitioner argues (Br. 31-32) that the government's approach would create a "notice trap" because the Federal Rules of Appellate Procedure are "silent" about whether a second notice of appeal is required. Yet the Rules are not silent: They clearly indicate—as does Section 3742—that a notice of appeal must be filed after the sentence intended to be appealed. See pp. 10-11, *supra*. And if the Court confirms that reading through its decision in this case, it will eliminate any lingering uncertainty. Doing so

will not create a "trap"; it will simply conform to the intuitive principle that a litigant must file a new notice of appeal in order to challenge a new court order.[7]

C. Petitioner's Failure To File A Notice Of Appeal Cannot Be Excused As Harmless Error Under Federal Rule Of Criminal Procedure 52(a)

Petitioner argues, in the alternative, that the lack of a notice of appeal was merely a procedural "error" that may be excused as harmless under Federal Rule of Criminal Procedure 52(a). But petitioner's *own* failure to appeal the district court's award of restitution was not an "error" in the proceedings. Rather, petitioner simply did not satisfy a prerequisite that was necessary to confer jurisdiction on the court of appeals to review the award. At a minimum, the notice of appeal requirement is a mandatory claim-processing rule that must be given effect where—as here—it is invoked by the other side.

1. "'Federal courts are courts of limited jurisdiction,' possessing 'only that power authorized by Constitution and statute.'" *Gunn* v. *Minton*, 133 S. Ct. 1059, 1064 (2013) (quoting *Kokkonen* v. *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)). Congress may set limits, not only as to the class of cases over

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[7] Under Federal Rule of Criminal Procedure 32(j)(1)(B), a district court imposing a criminal sentence must advise the defendant of his right to appeal. That requirement will normally suffice, in a deferred-restitution case, to provide the defendant with "a clear opportunity to announce his intention to appeal" any award of restitution, and to do so "well before the 10-day filing period runs." *Peguero* v. *United States*, 526 U.S. 23, 27 (1999). In this case, the district court failed to advise petitioner of his right to appeal the restitution award, but there is no dispute that petitioner nevertheless "was aware of his right to appeal." *Id.* at 24.

which federal courts have jurisdiction, but also as to "when, and under what conditions, federal courts can hear them." *Bowles* v. *Russell*, 551 U.S. 205, 213 (2007). When a would-be appellant fails to satisfy a jurisdictional prerequisite to appellate review, therefore, "the Court of Appeals ha[s] no jurisdiction * * * to pass on the merits of" his appeal. *Abney*, 431 U.S. at 663. The requirement that an appealing defendant "file a notice of appeal," 18 U.S.C. 3742(a), is such a jurisdictional prerequisite. See *Griggs*, 459 U.S. at 58.

The jurisdictional nature of Section 3742(a) was squarely at issue in *Ruiz*. There, the Court felt compelled, before considering the merits of a criminal defendant's appeal, to confront "a question of statutory jurisdiction [that] potentially blocks our consideration." 536 U.S. at 626. That question was whether the defendant's argument fell within the class of sentencing errors, delineated by Section 3742(a), as to which a "defendant may file a notice of appeal." *Id.* at 627 (quoting 18 U.S.C. 3742(a)). After examining the defendant's arguments, the Court concluded that he had, in fact, invoked a ground for appeal that was covered by Section 3742(a); as a result, "appellate jurisdiction was proper." *Id.* at 628. *Ruiz* thus confirms that a defendant's appeal must comply with Section 3742(a) in order to fall within the "limited appellate jurisdiction to review federal sentences" created by that provision. *Koon*, 518 U.S. at 96.

The holding of *Ruiz* is consistent with a long line of decisions in which "[t]he filing of a notice of appeal," when required by statute, has been treated as "an event of jurisdictional significance." *Griggs*, 459 U.S. at 58. For instance, *Torres* addressed whether the court of appeals had "jurisdiction" to consider the

claims of a party who had been a plaintiff in the district court, but whose name did not appear on the notice of appeal. 487 U.S. at 313. This Court held that appellate jurisdiction did not exist, because "[t]he failure to name a party in a notice of appeal is more than excusable informality; it constitutes a failure of that party to appeal." *Id.* at 314 (internal quotation marks omitted); see *id.* at 317 n.3 (petitioner "fail[ed] to clear a jurisdictional hurdle"). Other decisions have similarly treated the statutory requirement of a valid notice of appeal as being "jurisdictional in nature." *Smith* v. *Barry*, 502 U.S. 244, 248 (1992); see *Bowles*, 551 U.S. at 213 ("Bowles' failure to file his notice of appeal in accordance with the statute therefore deprived the Court of Appeals of jurisdiction."); *Marrese* v. *American Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 379 (1985); *Griggs*, 459 U.S. at 61 ("[I]f no notice of appeal is filed at all, the Court of Appeals lacks jurisdiction to act.").[8]

In sum, compliance with Section 3742(a) is a jurisdictional prerequisite to obtaining appellate review of a criminal sentence. And, as noted above, a defendant who wishes to satisfy Section 3742(a) must "file a notice of appeal." See pp. 8-9, *supra*. Therefore, because petitioner did not file a notice of appeal challenging the district court's award of restitution, the

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[8] The Federal Rules are consistent with that understanding. Federal Rule of Appellate Procedure 4(b)(5) provides that "[t]he filing of a notice of appeal * * * does not divest a district court of jurisdiction to correct a sentence under Federal Rule of Criminal Procedure 35(a)." The obvious implication is that, for other purposes, the notice of appeal *does* divest a district court of jurisdiction, and it transfers that jurisdiction to the court of appeals.

court of appeals never acquired jurisdiction over that aspect of his case.

2. Even if the Court concludes that filing a notice of appeal is not a jurisdictional prerequisite for appellate review, however, that "does not mean that it is not mandatory or that a timely objection can be ignored." *Gonzalez* v. *Thaler*, 132 S. Ct. 641, 651 (2012). At a minimum, the notice of appeal requirement is a mandatory claim-processing rule that must be enforced where, as here, it is properly invoked. Claim-processing rules "seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Henderson* v. *Shinseki*, 562 U.S. 428, 435 (2011). Such rules may be forfeited "if the party asserting the rule waits too long to raise the point," but they are "unalterable on a party's application." *Eberhart* v. *United States*, 546 U.S. 12, 15 (2005) (per curiam) (quoting *Kontrick* v. *Ryan*, 540 U.S. 443, 456 (2004)).

In this case, the government unquestionably timely invoked the notice of appeal requirement. In the court of appeals, petitioner's opening brief signaled for the first time his intention to challenge the amount of restitution. In response, the government argued that petitioner "waived his right to appeal the district court's order of restitution by failing to file a notice of appeal from that order." Gov't C.A. Br. 22 (capitalization omitted); see *id.* at 22-25. In light of that objection, "the court's duty to dismiss the appeal was mandatory." *Eberhart*, 546 U.S. at 18; see *id.* at 19 ("[C]laim-processing rules thus assure relief to a party properly raising them.").[9]

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[9] The Federal Rules of Appellate Procedure themselves underscore the mandatory nature of the notice of appeal requirement.

3. Petitioner argues (Br. 32-41) that his failure to file a notice appeal was merely an "irregularity" in the proceedings that must be excused under Federal Rule of Criminal Procedure 52(a) unless the government can prove prejudice. Rule 52(a) provides that "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." The rule was designed to prevent courts of appeals from reversing convictions on the basis of errors in the district court record that had no effect on the outcome. See *Kotteakos* v. *United States*, 328 U.S. 750, 758-760 (1946) (describing adoption of the "harmless error" statute on which Rule 52(a) was based). "When the defendant has made a timely objection to an error and Rule 52(a) applies, a court of appeals normally engages in a specific analysis of the district court record—a so-called 'harmless error' inquiry—to determine whether the error was prejudicial." *United States* v. *Olano*, 507 U.S. 725, 734 (1993).

Rule 52(a) does not apply here, because petitioner's failure to appeal from the restitution award was not an "error, defect, irregularity, or variance" in the district court record. The decision whether to appeal an adverse judgment rests entirely with the litigating parties. See *Greenlaw*, 554 U.S. at 243-244. When a party does not appeal, it cannot be said that an "error" has occurred within the meaning of Rule 52.

Rule 4(b)(4) allows a district court to "extend the time to file a notice of appeal for a period not to exceed 30 days," but only "[u]pon a finding of excusable neglect or good cause." And Rule 26(b)(1) specifies that a court "may not" otherwise extend a notice of appeal deadline even "[f]or good cause." If a party's delay in filing a notice of appeal cannot be excused after 30 days even for good cause, it follows *a fortiori* that a party's failure to file *any* notice of appeal cannot be excused.

See *Olano*, 507 U.S. at 733-734 (error occurs "[i]f a legal rule was violated during the district court proceedings") (discussing Rule 52(b)). The party has simply failed to take a step necessary to subject the district court's judgment to appellate review.

The type of errors to which Rule 52 applies was recently explained in *Musacchio* v. *United States*, 136 S. Ct. 709 (2016). There, a criminal defendant acknowledged that he had failed to raise a statute-of-limitations defense at or before trial, but he argued that the court of appeals was nevertheless authorized under Rule 52(b) to evaluate the defense under "plain error" review. This Court rejected that argument, explaining that when a party fails to take the steps necessary to advance his claims, no "error" within the meaning of Rule 52(b) has occurred:

> When a defendant fails to press a limitations defense, the defense does not become part of the case and the Government does not otherwise have the burden of proving that it filed a timely indictment. When a defendant does not press the defense, then, there is no error for an appellate court to correct—and certainly no plain error.

Id. at 718. The same reasoning applies to petitioner's "harmless error" argument. Because petitioner failed to appeal the district court's award of restitution, the amount of restitution was not at issue on appeal, and there was no error—harmless or otherwise—for the court of appeals to correct. Indeed, because the notice of appeal requirement is mandatory, had the court of appeals nevertheless excused petitioner's failure to appeal, the court would have *introduced* error into the proceedings.

Petitioner's argument also has troubling implications. If petitioner were correct (Br. 33) that a litigant's own failure to follow a mandatory claim-processing rule must "be disregarded unless substantial rights are affected," then such rules would cease to be mandatory in any practical sense. The Federal Rules impose numerous filing deadlines, for instance, and in most cases it will be difficult for a litigant to show prejudice from the opposing party's violation of a filing deadline. Petitioner all but admits as much, stating that, under his approach, a court of appeals would almost always be required to overlook a party's failure to comply with the notice of appeal requirement. See Pet. Br. 16 ("It is difficult to imagine circumstances in which the government might be substantially prejudiced by the absence of a second notice of appeal."). Yet this Court has repeatedly stated that courts "are not at liberty to ignore" mandatory claim-processing rules that have been properly invoked. *Carlisle* v. *United States*, 517 U.S. 416, 430 (1996); see *Gonzalez*, 132 S. Ct. at 651 ("mandatory"); *Eberhart*, 546 U.S. at 19 ("assure relief to a party properly raising them"); *Kontrick*, 540 U.S. at 456 ("unalterable").

4. Finally, petitioner argues (Br. 33-35) that his failure to file a notice of appeal must be "disregarded" under *Lemke*. As noted above, see pp. 17-18, *supra*, *Lemke* involved a criminal defendant who filed a notice of appeal after the district court announced his sentence but before the judgment had been entered on the docket. The court of appeals dismissed his appeal as premature. 346 U.S. at 326. In a one-page summary order, this Court reversed, holding that "the irregularity [wa]s governed by Rule 52(a)." *Ibid.*

Lemke does not support petitioner's argument that his failure file a notice of appeal must be forgiven as harmless error. In that case, the government did not object to the premature notice of appeal; rather, the court of appeals had dismissed the case *sua sponte*. See Pet. at 3, *Lemke*, *supra* (No. 109) ("No motion to dismiss the appeal was served or filed by the United States Attorney"). Although this Court characterized the defendant's premature notice of appeal as an "irregularity" governed by Rule 52(a), in modern terminology it would more accurately be described as the violation of a claim-processing rule that, "even if unalterable on a party's application, can nonetheless be forfeited if the party asserting the rule waits too long to raise the point." *Kontrick*, 540 U.S. at 456; see *id.* at 456-460 (finding that a litigant had forfeited reliance on the time limits established by the Federal Rules of Bankruptcy Procedure). Here, by contrast, the notice of appeal requirement—in addition to being a jurisdictional prerequisite to appellate review—was properly invoked by the government.

In any event, this Court's more-recent decisions squarely reject the notion that a litigant's failure to file a valid notice of appeal may be excused absent prejudice to the other party. In *United States* v. *Robinson*, 361 U.S. 220 (1960), the Court strictly enforced the time limitation for filing a notice of appeal in a criminal case, concluding that the period could not be extended "regardless of excuse." *Id.* at 229. Similarly, in *Griggs*, the Court rejected an argument that a notice of appeal, deemed "premature" by a then-applicable Federal Rule of Appellate Procedure, could nevertheless be given effect "unless the appellee can show prejudice resulting from the premature filing of

the notice." 459 U.S. at 57 (citations omitted). And in *Torres*, the Court rejected the argument that "failure to name a party in a notice of appeal" was an "excusable informality" that could be forgiven as "harmless error." 487 U.S. at 314, 317 n.3. The same result is appropriate here.[10]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[10] The requirements at issue in *Robinson*, *Griggs*, and *Torres* were described by the Court as "jurisdictional." See *Robinson*, 361 U.S. at 224; *Griggs*, 459 U.S. at 58-59; *Torres*, 487 U.S. at 314-317. If rendered today, those decisions would most likely characterize the relevant rules in different terms. See *Eberhart*, 546 U.S. at 18. But any "imprecision" in terminology should not be allowed to "obscure[ ] the central point" of those cases: "that when the Government object[s]" to the opposing party's failure to file a proper notice of appeal, "the court's duty to dismiss the appeal [i]s mandatory." *Ibid.*

APPENDIX

1. 18 U.S.C. 3664 provides in pertinent part:

Procedure for issuance and enforcement of order of restitution

(a) For orders of restitution under this title, the court shall order the probation officer to obtain and include in its presentence report, or in a separate report, as the court may direct, information sufficient for the court to exercise its discretion in fashioning a restitution order. The report shall include, to the extent practicable, a complete accounting of the losses to each victim, any restitution owed pursuant to a plea agreement, and information relating to the economic circumstances of each defendant. If the number or identity of victims cannot be reasonably ascertained, or other circumstances exist that make this requirement clearly impracticable, the probation officer shall so inform the court.

(b) The court shall disclose to both the defendant and the attorney for the Government all portions of the presentence or other report pertaining to the matters described in subsection (a) of this section.

(c) The provisions of this chapter, chapter 227, and Rule 32(c) of the Federal Rules of Criminal Procedure shall be the only rules applicable to proceedings under this section.

(d)(1) Upon the request of the probation officer, but not later than 60 days prior to the date initially set for sentencing, the attorney for the Government, after consulting, to the extent practicable, with all identified

victims, shall promptly provide the probation officer with a listing of the amounts subject to restitution.

(2) The probation officer shall, prior to submitting the presentence report under subsection (a), to the extent practicable—

(A) provide notice to all identified victims of—

(i) the offense or offenses of which the defendant was convicted;

(ii) the amounts subject to restitution submitted to the probation officer;

(iii) the opportunity of the victim to submit information to the probation officer concerning the amount of the victim's losses;

(iv) the scheduled date, time, and place of the sentencing hearing;

(v) the availability of a lien in favor of the victim pursuant to subsection (m)(1)(B); and

(vi) the opportunity of the victim to file with the probation officer a separate affidavit relating to the amount of the victim's losses subject to restitution; and

(B) provide the victim with an affidavit form to submit pursuant to subparagraph (A)(vi).

(3) Each defendant shall prepare and file with the probation officer an affidavit fully describing the financial resources of the defendant, including a complete listing of all assets owned or controlled by the defendant as of the date on which the defendant was arrested, the financial needs and earning ability of the defendant and the defendant's dependents,

and such other information that the court requires relating to such other factors as the court deems appropriate.

(4) After reviewing the report of the probation officer, the court may require additional documentation or hear testimony. The privacy of any records filed, or testimony heard, pursuant to this section shall be maintained to the greatest extent possible, and such records may be filed or testimony heard in camera.

(5) If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing. If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief.

(6) The court may refer any issue arising in connection with a proposed order of restitution to a magistrate judge or special master for proposed findings of fact and recommendations as to disposition, subject to a de novo determination of the issue by the court.

(e) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of

demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant's dependents, shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

* * * * *

(*o*) A sentence that imposes an order of restitution is a final judgment notwithstanding the fact that—

(1) such a sentence can subsequently be—

(A) corrected under Rule 35 of the Federal Rules of Criminal Procedure and section 3742 of chapter 235 of this title;

(B) appealed and modified under section 3742;

(C) amended under subsection (d)(5); or

(D) adjusted under section 3664(k), 3572, or 3613A; or

(2) the defendant may be resentenced under section 3565 or 3614.

* * * * *

2. 18 U.S.C. 3742 provides in pertinent part:

Review of a sentence

(a) APPEAL BY A DEFENDANT.—A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11)[1] than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

(b) APPEAL BY THE GOVERNMENT.—The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is less than the sentence specified in the applicable guideline range to the extent that the sen-

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[1] See References in Text note below.

tence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11)[1] than the minimum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

The Government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General.

* * * * *

3. Fed. R. App. P 3 provides:

Appeal as of Right—How Taken

(a) Filing the Notice of Appeal.

(1) An appeal permitted by law as of right from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk within the time allowed by Rule 4. At the time of filing, the appellant must furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d).

(2) An appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only

for the court of appeals to act as it considers appropriate, including dismissing the appeal.

(3) An appeal from a judgment by a magistrate judge in a civil case is taken in the same way as an appeal from any other district court judgment.

(4) An appeal by permission under 28 U.S.C. § 1292(b) or an appeal in a bankruptcy case may be taken only in the manner prescribed by Rules 5 and 6, respectively.

(b) Joint or Consolidated Appeals.

(1) When two or more parties are entitled to appeal from a district-court judgment or order, and their interests make joinder practicable, they may file a joint notice of appeal. They may then proceed on appeal as a single appellant.

(2) When the parties have filed separate timely notices of appeal, the appeals may be joined or consolidated by the court of appeals.

(c) Contents of the Notice of Appeal.

(1) The notice of appeal must:

(A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X";

(B) designate the judgment, order, or part thereof being appealed; and

(C) name the court to which the appeal is taken.

(2) A pro se notice of appeal is considered filed on behalf of the signer and the signer's spouse and minor children (if they are parties), unless the notice clearly indicates otherwise.

(3) In a class action, whether or not the class has been certified, the notice of appeal is sufficient if it names one person qualified to bring the appeal as representative of the class.

(4) An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice.

(5) Form 1 in the Appendix of Forms is a suggested form of a notice of appeal.

(d) Serving the Notice of Appeal.

(1) The district clerk must serve notice of the filing of a notice of appeal by mailing a copy to each party's counsel of record—excluding the appellant's —or, if a party is proceeding pro se, to the party's last known address. When a defendant in a criminal case appeals, the clerk must also serve a copy of the notice of appeal on the defendant, either by personal service or by mail addressed to the defendant. The clerk must promptly send a copy of the notice of appeal and of the docket entries—and any later docket entries—to the clerk of the court of appeals named in the notice. The district clerk must note, on each copy, the date when the notice of appeal was filed.

(2) If an inmate confined in an institution files a notice of appeal in the manner provided by Rule 4(c), the district clerk must also note the date when the clerk docketed the notice.

(3) The district clerk's failure to serve notice does not affect the validity of the appeal. The clerk must note on the docket the names of the parties to whom the clerk mails copies, with the date of mailing. Service is sufficient despite the death of a party or the party's counsel.

(e) **Payment of Fees.** Upon filing a notice of appeal, the appellant must pay the district clerk all required fees. The district clerk receives the appellate docket fee on behalf of the court of appeals.

4. Fed. R. App. P. 4 provides:

Appeal as of Right—When Taken

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.

(B) The notice of appeal may be filed by any party within 60 days after entry of the judgment or order appealed from if one of the parties is:

(i) the United States;

(ii) a United States agency;

(iii) a United States officer or employee sued in an official capacity; or

(iv) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf—including all instances in which the United States represents that person when the judgment or order is entered or files the appeal for that person.

(C) An appeal from an order granting or denying an application for a writ of error coram nobis is an appeal in a civil case for purposes of Rule 4(a).

(2) **Filing Before Entry of Judgment.** A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

(3) **Multiple Appeals.** If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

(4) **Effect of a Motion on a Notice of Appeal.**

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 28 days after the judgment is entered.

(B)(i) If a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment's alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice of appeal—in compliance with Rule 3(c)—within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

(iii) No additional fee is required to file an amended notice.

(5) Motion for Extension of Time.

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later.

(6) Reopening the Time to File an Appeal. The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after

the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and

(C) the court finds that no party would be prejudiced.

(7) **Entry Defined.**

(A) A judgment or order is entered for purposes of this Rule 4(a):

(i) if Federal Rule of Civil Procedure 58(a) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a); or

(ii) if Federal Rule of Civil Procedure 58(a) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

- the judgment or order is set forth on a separate document, or
- 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79(a).

(B) A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58(a) does not affect the validity of an appeal from that judgment or order.

(b) Appeal in a Criminal Case.

(1) Time for Filing a Notice of Appeal.

(A) In a criminal case, a defendant's notice of appeal must be filed in the district court within 14 days after the later of:

(i) the entry of either the judgment or the order being appealed; or

(ii) the filing of the government's notice of appeal.

(B) When the government is entitled to appeal, its notice of appeal must be filed in the district court within 30 days after the later of:

(i) the entry of the judgment or order being appealed; or

(ii) the filing of a notice of appeal by any defendant.

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision, sentence, or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

(3) Effect of a Motion on a Notice of Appeal.

(A) If a defendant timely makes any of the following motions under the Federal Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must be filed within 14 days after the entry of the order disposing of the last such remaining motion, or within 14 days after the entry of the judgment of conviction, whichever period ends later. This provision applies to a timely motion:

(i) for judgment of acquittal under Rule 29;

(ii) for a new trial under Rule 33, but if based on newly discovered evidence, only if the motion is made no later than 14 days after the entry of the judgment; or

(iii) for arrest of judgment under Rule 34.

(B) A notice of appeal filed after the court announces a decision, sentence, or order—but before it disposes of any of the motions referred to in Rule 4(b)(3)(A)—becomes effective upon the later of the following:

(i) the entry of the order disposing of the last such remaining motion; or

(ii) the entry of the judgment of conviction.

(C) A valid notice of appeal is effective—without amendment—to appeal from an order disposing of any of the motions referred to in Rule 4(b)(3)(A).

(4) **Motion for Extension of Time.** Upon a finding of excusable neglect or good cause, the district court may—before or after the time has expired, with or without motion and notice—extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b).

(5) **Jurisdiction.** The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Federal Rule of Criminal Procedure 35(a), nor does the filing of a motion under 35(a) affect the validity of a notice of appeal filed before entry of the order disposing of the

motion. The filing of a motion under Federal Rule of Criminal Procedure 35(a) does not suspend the time for filing a notice of appeal from a judgment of conviction.

(6) Entry Defined. A judgment or order is entered for purposes of this Rule 4(b) when it is entered on the criminal docket.

(c) Appeal by an Inmate Confined in an Institution.

(1) If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

(2) If an inmate files the first notice of appeal in a civil case under this Rule 4(c), the 14-day period provided in Rule 4(a)(3) for another party to file a notice of appeal runs from the date when the district court dockets the first notice.

(3) When a defendant in a criminal case files a notice of appeal under this Rule 4(c), the 30-day period for the government to file its notice of appeal runs from the entry of the judgment or order appealed from or from the district court's docketing of the defendant's notice of appeal, whichever is later.

(d) Mistaken Filing in the Court of Appeals. If a notice of appeal in either a civil or a criminal case is

mistakenly filed in the court of appeals, the clerk of that court must note on the notice the date when it was received and send it to the district clerk. The notice is then considered filed in the district court on the date so noted.

4. Fed. R. Crim. P. 52 provides:

Harmless and Plain Error

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

No. 15-7250

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In The Supreme Court of the United States

MARCELO MANRIQUE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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REPLY ARGUMENT

Petitioner filed a notice of appeal directed to his final judgment and sentence. That filing invoked the Court of Appeals' jurisdiction, which remained extant when the district court filled in the blanks of the restitution portion of his sentence. Under the Federal Rules of Appellate Procedure, a single notice of appeal perfects an appeal of a trial court's judgment and sentence including restitution, even if the specifics of restitution are deferred as allowed by statute and *Dolan v. United States*, 560 U.S. 605 (2010).

The government disagrees, arguing that two (or conceivably more) notices of appeal are required. The government's interpretation does not accord with the Federal Rules of Appellate Procedure.

A. Fed. R. App. P. 3(a) and 4(b) govern the means to perfect an appeal of an amended judgment specifying restitution.

The time for perfecting a criminal appeal is "rule-based," not "statute-based" as in civil cases. *Bowles v. Russell*, 551 U.S. 205, 212 (2007).

1. Petitioner satisfied the Rule-based temporal limits for perfecting a criminal appeal.

Fed. R. App. P. 3(a)(1) requires that an appeal of right be initiated by the filing of a notice of appeal with the district court within the time allowed by Rule 4,

here 14 days, in the form required by Fed. R. App. P. 3(c)(1). Those requirements were met in this case, as they are in any case involving deferred restitution under the Mandatory Victims Restitution Act and the procedure approved in *Dolan*.

Here, the district court announced its judgment and sentence on June 24, 2014, including mandatory but unspecified restitution:

> THE COURT: [R]estitution is mandatory. . . . It is further ordered that . . the victim's losses are not yet ascertainable; therefore, the court will set a date [within 90 days] for the final determination of the victim's losses.

JA:27. That oral pronouncement was followed by a final judgment, which deferred restitution until August 22, 2014, and stated that an amended judgment will be entered after such determination. The incomplete judgment left blank the restitution boxes entitled "Name of Payee," "Total Loss," "Restitution Ordered," and "Priority or Percentage." JA:39.[1]

Petitioner complied with Rule 3(a) & (c) by timely filing a notice of appeal on July 8, 2014, designating his name as appellant, that the appeal was from the "final judgment and sentence entered in this action on the 24th of June, 2014," and it was taken to the United

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[1] The government focuses not on the blanks and caveat, but rather on the placeholder restitution amount of $0.00. It is unreasonable to construe the June 24th judgment as a final judgment awarding $0.00 restitution.

States Court of Appeals for the Eleventh Circuit. DE:42. He thus satisfied Rule 3's requirements for invoking the Court of Appeals' jurisdiction. Within 90 days of the original sentencing – while the appeal was pending, but before any briefing had taken place – the district judge entered an amended judgment filling in the empty blanks and noting that the amended judgment modified only the restitution ordered. DE:66,74. The government's brief in the Court of Appeals accurately characterized the amended judgment as "adding the order of restitution to the original judgment." *See* Gov't Br. CA 2, *United States v. Manrique*, 618 F. App'x 579 (11th Cir. 2015) (No. 14-13029).

That characterization is reinforced because the district court did not again advise Petitioner of his right to appeal after specifying the amount of restitution, as Fed. R. Crim. P. 32(j)(1)(B) would require following a sentencing. The absence of Rule 32's required advisory signals that the district court knew that the sentence was already on appeal awaiting filled-in blanks. The court knew the restitution award would be challenged on appeal, commenting, "I don't know the right answer to this. I hope that the Eleventh [C]ircuit will give me some guidance on this. " JA:61. If the district court believed the appeal had not yet been perfected, Rule 32(j)(1)(B) required a new advisory "after sentencing" because there was no reason to believe Petitioner was aware he needed to file a second notice in his pending appeal. The government interprets the absence of an advisory as demonstrating Petitioner already knew of his right to appeal, relying on *Peguero v.*

United States, 526 U.S. 23 (1999). *See* Br. 28 n.7. But unlike in *Peguero*, the events of record show all too clearly that Petitioner was unaware of any such requirement.

The district court's two-step process for entering a judgment conforms to the procedure this Court outlined in *Dolan*: "[T]he statute before us itself provides adequate authority to do what the sentencing judge did here – essentially fill in an amount related blank in a judgment that made clear restitution was applicable." 560 U.S. at 620.

The question is not, therefore, whether the Court of Appeals' jurisdiction was invoked. It was. The question is whether a second notice of appeal was necessary to invoke it again. Three circuits have held that a single notice of appeal suffices, but the government does not address any of those decisions: *United States v. Cheal*, 389 F.3d 35 (1st Cir. 2004); *United States v. Ryan*, 806 F.3d 691, 692 (2d Cir. 2015); *Hyde v. United States*, 556 F. App'x 62, 63 n.1 (2d Cir. 2014); *United States v. Stoian*, 2015 WL 5036366 (6th Cir. Aug. 12, 2015); *United States v. Malcolm*, 114 F.3d 1190 (table), 1997 WL 311416 at *6 (6th Cir. 1997). After the government filed its brief, the Second Circuit reiterated these decisions in *United States v. Goldberg*, ___ F. App'x ___, 2016 WL 4626552 at *1 n.1 (2d Cir. Sept. 6, 2016) ("Goldberg's notice of appeal was premature as to restitution because the final restitution order was not entered until July 2, 2015. Nevertheless, in accordance with Federal Rule of Appellate Procedure 4(b)(2), Goldberg's notice of appeal was deemed effective upon

entry of the July 2, 2015 order. *See* Fed. R. App. P. 4(b)(2).").

Those circuit decisions apply the savings clause of Fed. R. App. P. 4(b)(2) to perfect the appeal of the truly final judgment and sentence. The savings clause states:

> **Filing Before Entry of Judgment.** A notice of appeal filed after the court announces a sentence – but before entry of the judgment or order – is treated as filed on the date of and after entry.

Id. The phrase "the judgment" in Rule 4(b)(2) refers to the truly final judgment with its blanks filled in. Whether one characterizes it as the government did below, as "adding the order of restitution to the original judgment"; or as the Court did in *Dolan*, as "fill[ing] in an amount related blank in a judgment that made clear that restitution was 'applicable,'" 560 U.S. at 618 – the effect is the same. The one and only judgment is the completed final judgment. Once the final judgment is completed, the previously-filed notice of appeal matures automatically by virtue of Rule 4(b)(2). Here, the notice matured to perfect appeal of the completed June 24th judgment.

The government disagrees, contending that the trial court's sentence on June 24th was a final decision as to conviction and incarceration, but not as to restitution, because further restitution proceedings were yet to occur; the notice of appeal preceded the restitution hearing and order detailing restitution.

Consequently, the government argues, the notice of appeal cannot mature to cover the finalized judgment. "Putting the horse (the sentence) before the cart (the notice of appeal) helps prevent unnecessary and frivolous appeals." Br. 11. The government's premises and analogy have been rejected by the Court in both civil and criminal appeals.

It is incorrect to say, as the government does, that one cannot notice an appeal before knowing the basis for appeal. In the typical cold-record criminal appeal, for example, new counsel is first appointed for appeal. The newly-appointed lawyer rarely knows any bases for appeal before reviewing the record and transcripts that are prepared much later. *See Anders v. California*, 386 U.S. 738 (1967). Criminal defense counsel must nevertheless notice an appeal, if the client requests one, whether meritorious issues are apparent or not. *See Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000) (citing *Rodriquez v. United States*, 395 U.S. 327 (1969) and *Peguero*, 526 U.S. at 28 (noting that defendant requesting appeal is entitled to appeal without showing issues of merit)). As a practical matter, identification of appellate issues by counsel, and disclosure of those issues to opposing parties, both occur for the first time in the initial brief. *See* Pet. Br. 26-27.

The government claims that the savings clause cannot perfect a notice of appeal filed before the trial court fully specifies its final decision. But this is contrary to this Court's decisions holding that a notice of appeal may be filed while an otherwise final judgment is incomplete or provisional. Those decisions include

one relied upon by the government in its own argument, *FirsTier Mortg. Co. v. Investors Mortg. Ins. Co.*, 498 U.S. 269 (1991). *See* Br. 17-18. Indeed, *FirsTier* supports Petitioner's position that a notice of appeal filed after an incomplete order later matures to perfect its appeal.

FirsTier addressed Fed. R. App. P. 4(a)(2), the civil appeal counterpart of Rule 4(b)(2). FirsTier noticed a civil appeal after the district court announced from the bench it intended to grant summary judgment for the respondent, but before entry of judgment and before the court made any findings of fact or law. Proposed findings had not yet been submitted, as the district court requested. The question presented was "whether the bench ruling is a 'decision' under Fed. R. App. P. 4(a)(2)." The general bench announcement in *FirsTier* was much like the district court's general announcement at sentencing here, that restitution is mandatory. The appellee maintained, much as the government does here, "for a ruling to be final, it must end the litigation on the merits, and the judge must clearly declare his intention in this respect." *Id.* (citations, alterations and internal quotations omitted). Appellee argued, further, that the judge did not terminate the litigation and that he did not explicitly exclude the possibility that he might change his mind in the interim. *Id.*

FirsTier noted the rationale for the savings clause of Rule 4(a)(2): "[U]nlike a tardy notice of appeal, certain premature notices of appeal do not prejudice the appellee and [] the technical defect of prematurity

therefore should not be allowed to extinguish an otherwise proper appeal." 498 U.S. at 651. With that understanding, the Court held that FirsTier's early notice did not come too early to perfect its plenary appeal: "[W]e conclude that Rule 4(a)(2) permits a notice of appeal to be filed from certain nonfinal decisions to serve as an effective notice from a subsequently entered final judgment." 489 U.S. at 652 & n.4.

The Court has ruled similarly as to provisional or interim sentences in criminal cases. Both *Corey v. United States*, 375 U.S. 169 (1963) and *United States v. Behrens*, 375 U.S. 162 (1963) considered 18 U.S.C. §4208(b), which permitted the district court to announce a provisional sentence and commitment, subject to a later final sentencing hearing. The purpose of the provisional sentence and commitment was to permit the Bureau of Prisons to conduct a study and make further recommendations about an appropriate final sentence. Following the study and recommendation, which could take up to six months, a final sentence was entered following a full sentencing hearing. *Corey* held that the provisional sentence had sufficient finality for purposes of appeal, even if it was not truly final. The Court noted that if the final modification of the sentence occurred while the case was on appeal, "only the final sentence which was later imposed" would still have been open to review on appeal. 375 U.S. at 174 n.15.

Behrens amplified *Corey*'s analysis: "The whole point of using [the provisional sentencing law] is, in its own language, to get 'more detailed information

as a basis for determining the sentence to be imposed * * * '" *Behrens*, 375 U.S. at 165 (quoting §4208(b)). The studies and reports "assist the judge in making up his mind as to what the final sentence shall be." *Id.* Those reasons for a provisional sentence mirror the reasons for a provisional final judgment in a case with deferred restitution. Significantly, *Behrens* concluded that the post-study sentencing hearing is the actual sentencing hearing, at which both the defendant and counsel must be present. *Id.* Although the hearing and actual sentence follow the notice of appeal, the first notice of appeal perfects the finalized judgment as well. *See Corey*, 375 U.S. at 174 n.15. The cart (the notice of appeal) may indeed precede the horse (the sentence). *See Behrens*, 375 U.S. at 165.

Finality is contextual, particularly the meaning of final judgment in deferred restitution appeals. *See United States v. Tulsiram*, 815 F.3d 114 (2d Cir. 2016) (acknowledging anomaly in deferred restitution cases because appealability precedes true finality of the judgment) (citing *Clay v. United States*, 537 U.S. 522, 527 (2003) ("[L]ike many legal terms," the meaning of final "depends on context.")); *see, also*, *United States v. Gilbert*, 807 F.3d 1197, 1200 (9th Cir. 2015) (citing other circuit decisions to the same effect, including *Cheal*, 389 F.3d at 51-52; *Gonzalez v. United States*, 792 F.3d 232, 237 (2d Cir. 2015); and *United States v. Muzio*, 757 F.3d 1243, 1250 (11th Cir. 2014)).

Each of these decisions implicitly accepts the observation of the *Restatement* that "final judgment" is not perfectly coterminous with "final enough to

appeal." *Restatement (Second) of Judgments* §13, Comment *b* (1980). In fact, this Court explicitly relied on the treatise's Comment *b* in its own discussion of the meaning of finality in federal criminal judgments on appeal. *See Clay*, 537 U.S. at 527. Comment *b* explains that the traditional meaning of what constitutes a final judgment has been altered by the allowance of appeals of final judgments before a judgment is truly final because, for example, the "amount of damages, or the form or scope of other relief, remains to be determined." Comment *b*. The government's brief claims that the *Restatement*'s commentary speaks to *res judicata* and interlocutory appeals. Br. 18-19 n.2. But the comment's observation is couched "in the context of statutes providing for appellate review of 'final decisions' (as in 28 U.S.C. §1291, 'Final decisions of district courts')." *Id.* And that was the context in which this Court viewed it in *Clay*.

Thus, a notice of appeal satisfies Rules 3(a)(1) and 4(b)(1) & (2), even if the details of restitution are yet to be filled in at the time the notice is filed. It satisfies Rule 3(a)(1) even if it is filed before the underlying proceedings have ended. It also satisfies Rule 4(b)(2)'s savings clause because it was filed "after the court announces a decision, sentence, or order – but before the entry of the judgment or order." That is what occurred here. An oral announcement was made ordering unspecified restitution, followed by a provisional judgment. Then an amended judgment specifying restitution was entered, "adding the order of restitution to the original judgment." *See* Gov't CA Br. 2. Upon entry of

the fill-in-the-blanks amended judgment, the original provisional judgment became "the judgment," referenced by Rule 4(b)(2) and the notice of appeal matured to perfect it.

2. 18 U.S.C. §3742 does not override the Rule-based temporal limits for perfecting an appeal of restitution.

To defend the Eleventh Circuit's jurisdictional holding below, the government disregards *Bowles*, arguing instead that the temporal requirements for perfecting a criminal appeal are based on statute, 18 U.S.C. §3742(a). Br. 10. This argument reads too much into §3742, which was adopted to enlarge the cognizable grounds for sentencing appeals and to authorize government appeals of sentences.

The government argues that §3742(a) specifies "the means by which appellate review may be obtained" because it states, "A defendant may file a notice of appeal . for review of an otherwise final sentence." Br. 9-11. The government extrapolates this general permissive language into a new temporal jurisdictional limitation on restitution appeals. *Id.* To the contrary, 28 U.S.C. §1291 has been, and continues to be, the jurisdictional basis for appealing a final judgment and sentence imposing restitution. And the temporal limits for such appeals have been, and continue to be, Rule-based under the Federal Rules of Appellate Procedure. Section 3742 simply supplements §1291 by enlarging the *cognizable grounds* for sentencing appeals

and by authorizing *government appeals*, both of which had previously been limited.

Indeed, if it were otherwise, the §3742 language cited by the government would override the Rules. This Court rejected a similar claim that the statute intended to change appellate procedures without specifically doing so. *See Greenlaw v. United States*, 554 U.S. 237, 251 (2008) ("We therefore see no reason to read the current statute [3742] in the inventive manner amicus proposes, inferring so much from so little."). Instead, the Court has assumed that Congress adopted §3742 aware of prior appellate practice, and intending it to operate in harmony with existing law. *Id.* at 250-51. *Greenlaw*'s conclusion applies here, as well.

Section 3742 was adopted as part of the Sentencing Reform Act of 1984 (effective 1987), an implementation of the federal Sentencing Guidelines. Section 3742 does not mention restitution, although it does specifically enumerate other aspects of a sentence – "fine, or term of imprisonment, probation, or supervised release." Clearly, §3742 did not alter the jurisdictional temporal limits to perfect an appeal, and particularly not appeals of the restitution portion of a criminal sentence.

Restitution sentences were imposed long before §3742 and the Sentencing Guidelines were adopted, under the provisions of the Victim and Witness Protection Act of 1982, and its predecessor, the Federal

Probation Act of 1925.[2] Such restitution sentences have long been appealable as a final decision under 28 U.S.C. §1291, which grants courts of appeals jurisdiction over "all final decisions" of the district courts. *See, e.g.*, *United States v. Palma*, 760 F.2d 475, 476 (3d Cir. 1985) (holding court of appeals had jurisdiction under §1291 to entertain appeal "from the sentence to the extent it orders restitution pursuant to the VWPA"); *United States v. Keith*, 754 F.2d 1388, 1390 (9th Cir. 1985) (same).

Decisions cited by the government do not say otherwise. Both *Koon v. United States*, 518 U.S. 81 (1996) and *United States v. Ruiz*, 536 U.S. 622 (2002) noted that §3742 altered the Court's prior jurisprudence limiting cognizable grounds for appellate review of *incarceration* sentences. Restitution was not at issue in either case. And neither were the temporal requirements for such appeals.

Section 3742's silence as to restitution evinces congressional intent that pre-existing statutory jurisdiction for appellate review of restitution, and the manner of review, were not to be changed by that new legislation. This silence signals no change to the existing jurisdictional grant, or caselaw interpreting it. *Greenlaw*, 554 U.S. at 250 (citing *Astoria Fed. Sav. & Loan Assn. v. Solimino*, 501 U.S. 104, 108 (1991) ("Congress is understood to legislate against a background of common-law adjudicatory principles.")).

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[2] Codified at 18 U.S.C. §§3651-3656 (repealed November 1, 1987).

Despite the adoption of §3742, the basis for jurisdiction over a restitution award continues to be set forth in §1291, which allots to the Courts of Appeals jurisdiction over "all final decisions." The manner of implementation of appellate review under §1291 remains under Federal Rules of Appellate Procedure 3 and 4(b). *See Bowles*, 551 U.S. at 212; *United States v. Lopez*, 562 F.3d 1309, 1312-13 (11th Cir. 2009).

3. Neighboring rules confirm that Petitioner perfected the temporal limits to appeal his restitution sentence.

Rule 4(a), governing civil appeals, specifies that additional notices of appeal are required to perfect appeal of "a judgment altered or amended." Rule 4(a)(4)(B)(iii). That requirement is absent from Rule 4(b), governing criminal appeals. The government gives short shrift to this contrast. Br. 22 n.3. But it is telling.

Instead, the government focuses on Rule 4(b)(3), a neighboring criminal appeal provision entitled "Effect of a Motion on a Notice of Appeal," arguing that its silence as to notices of appeal for amended restitution judgments implies that multiple notices of appeal are required. But under this view, the rules drafters wrote explicit rules for civil appellants, yet only by inference for criminal appellants – explicitly designating that civil appellants must file multiple notices within a single appeal (and waiving additional filing fees), while intending for criminal appellants to infer those same

requirements from the lack of explicit rules (and requiring criminal appellants to pay additional fees not required of their civil litigant counterparts). This is an unreasonable interpretation of the rules, especially since the drafters rewrote these provisions to eliminate traps for unsuspecting litigants. *See* Fed. R. App. P. 4(a), advisory committee's note (1993 amendment).

Furthermore, the neighboring rule on which the government relies relates to other matters altogether. Fed. R. App. P. 4(b)(3) covers three specific tolling motions having nothing to do with restitution. Unlike those freestanding motions, which *challenge* the final judgment and sentence, the restitution proceeding is not based on a defense motion – certainly not one challenging a final judgment. The district court's proceeding is simply a continuation of sentencing without further motions or pleading. Rule 4(b)(3) has neither explicit application to, nor does it offer relevant inferences about, the requirements to perfect appeal of a restitution sentence.

B. Petitioner's interpretation, which is employed in at least three circuits, avoids the significant adverse practical consequences of the government's approach.

1. Splintering a sentence into separate "decisions," as the government contends, causes significant adverse practical consequences.

The government's interpretation splinters a sentence into separate "decisions," then argues that a new notice of appeal is required each time the district court enters a deferred order or judgment of restitution. This interpretation has severe adverse practical consequences in deferred restitution cases.

The Mandatory Victims Restitution Act allots restitution to every identifiable victim suffering a pecuniary loss, which includes vast crimes such as fraud. *See* 18 U.S.C. §3663A(c)(1)(B). If conducted *seriatim*, the potential number of restitution hearings, orders, amended judgments and consequent appellate cases could easily number in the dozens, hundreds, or even thousands. Under the government's interpretation, a criminal defendant has to file separate notices of appeal for each (with separate filing fees), each creating a new appeal (subject to consolidation) in order to perfect a single appeal of the restitution award contained in the last amended judgment. The government's view is entirely inconsistent with the Rules' overriding principle that they are to be interpreted "to secure simplicity in procedure and fairness in administration, and to

eliminate unjustifiable expense and delay." Fed. R. Crim. P. 2; *see* Fed. R. App. P. 1(a)(2).

Additionally, the government's approach undermines the certainty of time limits for collateral review under 28 U.S.C. §2255. *See, e.g.*, *United States v. Barry*, 647 F. App'x 519 (6th Cir. 2016) (§2255 motion is appropriate forum to address ineffective assistance of counsel regarding restitution). If the final judgment and later-entered amended judgment(s) are different final judgments, as the government contends, their different dates of entry give rise to different deadlines to file for collateral review. *See* 28 U.S.C. §2255(f)(1). If neither the original judgment nor amended judgment(s) is appealed, §2255 petitions are due within a year (and 14 days) after their respective entry dates – different dates, often months apart. If one is appealed, but not the other(s), one is due when the appeal ends (plus 90 days if no certiorari petition is filed), but the other(s) is due based on the date it was originally entered – a date that may be before or after the appeal ends. If both are appealed unsuccessfully, but a petition for writ of certiorari is filed as to the issues in only one judgment, the due dates run from the date the appeal ends for one, but as of the date certiorari proceeding ends as to the other – usually months apart. This complicated consequence only results from the government's novel view that there are multiple final judgments in deferred restitution cases. Current jurisprudence, however, rejects this multiple due-date approach, implicitly rejecting the government's reading of multiple final judgments. *See United States v.*

Gilbert, 807 F.3d at 1201 ("one-year statute of limitations to file a §2255 motion does not restart when the specific amount of restitution is later entered").

These adverse consequences counsel against the government's proposed interpretation.

2. Petitioner's interpretation, embraced by the majority of circuits, has caused no adverse consequences.

Even though Petitioner's contrary interpretation has vitality in at least three circuits, the government questions its practicality. The government's brief invokes three rhetorical questions to suggest that Petitioner's reading is uncertain and interferes with rights of cross-appeal. Br. 25-26 & n.6.

First, the government inquires: What happens if the appeal of the original judgment has been resolved by the time the amended judgment specifying restitution is entered? This question is not unique to restitution appeals, for it applies to any application of the savings clauses in both civil and criminal appeals. Yet, the government is unable to identify a single instance in which its hypothetical has arisen, even in circuits that apply the savings clause to deferred restitution appeals. One may fairly conclude that it does not happen, and the reason is that the parties and courts of appeals are aware that the restitution question remains unresolved – the provisional final judgment says so – so the appellate court does not enter judgment before the restitution issues are resolved. Should

a district court refuse to complete its restitution task, this Court has advised that it is subject to mandamus. *See Dolan*, 560 U.S. at 617. Thus, even in the extreme cases identified by the government, including intervals as long as five years, Br. at 23 n.4, the courts of appeals have not resolved an appeal without deciding the restitution issue.[3] If, however, a court of appeals does enter its judgment and mandate before entry of the amended restitution judgment, its appellate jurisdiction would end, requiring a party to use the second option described in *Dolan* by appealing it separately.

Second, the government asks a hypothetical question based on its own convenience, a convenience not authorized by the rules: What happens "if the government believes a restitution award is too low but nevertheless declines to challenge it on appeal–unless the defendant does so first, in which case the government would consider a cross-appeal," but by the time of briefing a notice of appeal is too late? *Id.* This hypothetical is also not unique to deferred restitution appeals. The dilemma occurs in any appeal involving restitution,

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[3] The median length of a criminal appeal is 10.6 months, not 8.5 months as the government mistakenly asserts. *See* Br. 23-24. The government incorrectly cites Table B-4, instead of Table B-4A, of the Federal Judiciary's Annual Report for 2015. The pertinent information for "criminal appeals" is contained on page 2 of Table B-4A (http://www.uscourts.gov/file/19493/download). The table erroneously cited by the government includes all civil and criminal appeals, original proceedings, and miscellaneous applications. Table B-4 Note. Applications to file second or successive §2255 petitions skew the duration downward because they must be determined within 30 days. *See* 28 U.S.C. §§2255(h) & 2244(b)(3)(D).

even if not deferred, because briefing is the first time that the restitution issue need be mentioned. The answer is dictated by the rules, which afford the government no special luxury to sit and wait: It must file a timely notice of appeal or cross-appeal whenever it intends to appeal, whether the defendant enters an appeal or not – always subject to a voluntary dismissal, if that is its choice, after seeing its adversary's legal position on appeal.[4] If the government has not appealed at the outset, it may still do so after entry of the amended judgment. *See Gonzalez*, 792 F.3d at 237 (holding that there is a second opportunity to appeal after the final order disposing of the case in the district court), followed by *United States v. Ryan*, 806 F.3d at 692 n.1.

Third, the government hypothesizes that a defendant may lose the right to cross-appeal if the government appeals the initial sentence without signaling an intent to appeal restitution. The same rules apply to the defendant as apply to the government. If the defendant seeks only to defend the restitution award, he may do so without filing a cross-appeal. *El Paso Natural Gas v. Neztsosie*, 526 U.S. 473, 479 (1999) ("Absent a cross-appeal, an appellee may urge in support of a decree any matter appearing in the record.") (internal quotation omitted). If the defendant intends to cross-appeal, and has not earlier filed a notice of appeal, he may file a timely notice after the amended judgment is

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[4] The government may file a protective notice of appeal, deciding later whether to pursue its appeal. *See* 18 U.S.C. §3742(b); *Greenlaw*, 554 U.S. at 245-46.

entered. *See Gonzalez*, 792 F.3d at 237, and *Ryan*, 806 F.3d at 692 n.1.

C. An irregularity under Fed. R. App. P. 4(b)(2) is governed by the substantial-prejudice test of Fed. R. Crim. P. 52(a).

The government argues that Petitioner did not file a notice of appeal, a prerequisite to appellate jurisdiction. But that is incorrect. Petitioner did file a notice of appeal. And it was certainly timely as to the conviction and part of the sentence. So it timely invoked the Court of Appeals' jurisdiction. The alleged irregularity is that the timely notice was too early as to another aspect of the sentence in the same case. It was both timely and early at the same time. The MVRA allows this possibility, just as the provisional sentencing law did in *Corey* and *Behrens*. The question is whether the too-early part of the notice prevents appellate consideration of the full sentence.

The government contends that a notice of appeal that is both timely and partially too-early violates a mandatory claims-processing rule, and that violation, if invoked, requires automatic dismissal without any consideration of prejudice.

The automatic-dismissal decisions upon on which the government relies occurred in an era when irregularities were incorrectly denominated jurisdictional (1960-2005), beginning with *United States v. Robinson*, 361 U.S. 220 (1960). The government concedes, as it must, that those jurisdictionally-based automatic-dismissal decisions have been repudiated by the Court.

Br. 36 n.10; *see Kontrick v. Ryan*, 540 U.S. 443 (2004); *Eberhart v. United States*, 546 U.S. 12 (2005); and *Bowles v. Russell*, 551 U.S. 205.

Lemke v. United States, 346 U.S. 325 (1953) was decided prior to the repudiated jurisdictional-era. Rejecting a jurisdictional approach, it applied Fed. R. Crim. P. 52(a) to a too-early notice of appeal. *Lemke*'s holding was incorporated into the appellate rules governing criminal cases and was eventually incorporated into the civil appellate rules. *Lemke*'s holding and rationale continue to apply.

The government seeks to circumvent *Lemke* by speculating that if jurisdiction-era cases and *Lemke* were decided anew they would be decided in non-jurisdictional terms: If the government had objected in *Lemke*, the premature notice of appeal would have been automatically dismissed due to violation of a mandatory claims-processing rule.

That is quite a speculative leap, unsupported by the Rules and Court's precedents. The lack of an objection had nothing to do with *Lemke*'s holding; its application of the prejudice test would have resulted in the same outcome whether there had been a government objection or not. After *Lemke*'s holding became part of the appellate rules, its prejudice test was reiterated in *FirsTier*. Although the government cites and relies on *Griggs v. Provident Consumer Disc. Co.*, 458 U.S. 56 (1982), Br. 35-36, that decision's rejection of a prejudice test for premature notices of appeal in civil cases was abrogated by a rules amendment, which applied

Lemke's rule to civil appeals. *See* Fed. R. App. P. 4(a)(2) & (4), advisory committee's note (1993 amendment) (noting new rule eliminates the *Griggs* "trap for the unsuspecting litigant," who "fail[s] to file a second notice of appeal").

The Court's post-*Lemke* precedents have consistently reiterated that if a too-early notice "do[es] not prejudice the appellee," the "technical defect of prematurity . should not be allowed to extinguish an otherwise proper appeal." *FirsTier*, 498 U.S. at 651. "[I]f a litigant files papers in a fashion that is technically at variance with the letter of a procedural rule, a court may nonetheless find that the litigant has complied with the rule if the litigant's action is the functional equivalent of what the rule requires." *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 316-17 (1988) (citing *Houstan v. Lack*, 487 U.S. 266 (1988) (finding prisoner's imperfect delivery of notice of appeal constitutes "filing" under Fed. R. App. P. 3 and 4)). These precedents support a prejudice test, not the government's revisionist conclusion requiring automatic dismissal of a partially too-early notice of appeal.

The decisions relied on by the government are inapt because they did not involve early notices of appeal or the need to file a second notice of appeal. *Robinson* – the original of the jurisdiction-era cases – involved a late notice of appeal, not one that was partially timely and partially early. Nor did it address the failure to file a second notice of appeal. *Torres*' holding regarding civil appeals did not involve temporal limits at all, or

the failure to file a second notice of appeal, but rather addressed the failure to name a party in the notice.

Despite *Lemke*'s explicit application of Rule 52(a) to a premature notice of appeal, the government contends the rule applies only to court errors. Rule 52(a) contains no such limitation. *Musacchio v. United States*, 136 S. Ct. 709 (2016), on which the government relies, addressed Rule 52(b) (plain error), not Rule 52(a) (harmless error). Subsection (b) does relate to error "not brought to the court's attention." But subsection (a) has no such textual limitation. Rule 52(a) relates to "[a]ny error, defect, irregularity, or variance that does not affect substantial rights," and is silent about whether it may be by a party or the court. And, Rule 52(a)'s prejudice test has been applied to party pleadings, such as irregularities in an indictment. *See, e.g.*, *United States v. Stevenson*, ___ F.3d ___, 2016 WL 4191134 at *11 (3d Cir. Aug. 9, 2016) (applying Rule 52(a)'s harmless error test to error in indictment); *United States v. Dentler*, 492 F.3d 306, 310 (5th Cir. 2007) (same).

Consistent with *Lemke* and *FirsTier*, as well as *Corey* and *Behrens*, if a notice of appeal is filed both timely and too-early, as may occur with provisional sentences, that irregularity does not warrant dismissal without a consideration of prejudice. Here, of course, the government has alleged no prejudice at all. Far from being blindsided, the government devoted over seven pages of its brief in the Court of Appeals to defending the merits of the restitution sentence. Gov't CA Br. 25-32.

Applying Rule 52(a)'s prejudice test to a notice of appeal that is both partially timely – and partially too-early – does not swallow the whole of mandatory claims-processing rules. Rather, it recognizes that no meaningful foul occurs in those limited instances where a statute permits multiple steps to complete the sentencing process. Such timely/early notices satisfy the purposes served by claims-processing rules: The Court of Appeals' jurisdiction is invoked before the time for appeal expires; jurisdiction remains extant when the too-early portion of the notice would mature under the rules; and docketing and case management proceed as the rules require. The proceedings in this case, and the many others cited by both parties, prove this with certainty.

CONCLUSION

The judgment should be reversed and remanded.

Respectfully submitted,

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